No. 83-789

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In The

Supreme Court of the United States

October Term, 1983

GENEVIEVE S. ADAMS, *et al.*,

Petitioners,

vs.

THE PROCTOR & GAMBLE MANUFACTURING COMPANY,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

APPENDIX

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OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT, SITTING EN BANC, HEREIN

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT
NO. 81-1197

Genevieve S. Adams; Louise Bertha; Algerie R. (Kelley) Brigerman; Anne Brown; Carrie B. Chaffin; Leila B. Harthanson; Loretta M. Hinkle; Nellie Kern; Martha McGinn; Bertha Mabray; Anna M. Miller; Dorothy N. Shawker; Claretha Smith; Lorrayne M. Soethe; Margie Stover; Shirley S. Sunderland; Ethel Wimpling,

Appellants,

versus

The Proctor & Gamble Manufacturing Co.,

Appellee,

E.E.O.C.,

Amicus Curiae.

- - - - - - -

Appeal from the United States District Court for the District of Maryland, at Baltimore, Edward S. Northrop, District Judge

- - - - - - -

Argued October 5, 1982
Decided January 17, 1983

- - - - -

Before WINTER, Chief Judge, RUSSELL, WIDENER, HALL, PHILLIPS, MURNAGHAN, SPROUSE, ERVIN, CHAPMAN, Circuit Judges, and HAYNSWORTH, Senior Circuit Judge, Sitting En Banc

- - - - -

Sidney Blum for Appellants; Colleen M. O'Connor (Leroy D. Clark, General Counsel, Philip B. Sklover, Acting Associate General Counsel, Vincent Blackwood, Assistant General Counsel on brief) as Amicus Curiae; John A. McGuinn (Guy Farmer, Farmer, Wells, McGuinn, Flood, Sibal & Bechtel; Thomas B. Eastman, Ober, Grimes & Shriver; T.L. Overbey, Legal Dept., The Proctor & Gamble Manufacturing Company on brief) for Appellee.

PER CURIAM:

This case, concerning the preclusive effect upon charging parties of a consent decree in an action brought against an employer by the EEOC, was first heard by a panel of this court. A majority of the panel

held there was no preclusive effect, while Senior Judge Haynsworth dissented. Adams v. The Proctor & Gamble Mfg. Co., 678 F.2d 1190 (4th Cir. 1982). Thereafter, an order was entered granting rehearing en banc.

The question turns upon a proper interpretation of §706(f)(1) of Title VII, 42 U.S.C.A. §2000e-5(f)(1), which, insofar as pertinent, provides:

> (f)(1) If within thirty days after charge is filed with the Commission . . . the Commission has been unable to secure from the respondent a conciliation agreement acceptable to the Commission, the Commission may bring a civil action against any respondent not a government, governmental agency, or political subdivision named in the charges . . . The person or persons aggrieved shall have the right to intervene in a civil action brought by the Commission . . . If a charge filed with the Commission pursuant to subsection (b) of this section is dismissed by the Commission, or

> if within one hundred and eighty days from the filing of such charge . . ., the Commission has not filed a civil action under this section . . ., or the Commission has not entered into a conciliation agreement to which the person aggrieved is a party, the Commission . . . shall so notify the person aggrieved and within ninety days after the giving of such notice a civil action may be brought against the respondent named in the charge (A) by the person claiming to be aggrieved . . .

In 1976 the EEOC brought an action against Proctor & Gamble alleging employment discrimination. Some two dozen Proctor & Gamble employees had filed charges with the EEOC, but none of them chose to intervene in the EEOC action, though each had an unqualified right to do so under §706(f)(1). Negotiations between the employer and the EEOC resulted in a settlement of the action by consent decree. Thereafter, the EEOC issued right-

to-sue letters to those charging parties who rejected awards under the decree. When sixteen of those Proctor & Gamble workers with right-to-sue letters sued individually, the district court granted the company's motion to dismiss on the ground that the letters were invalid.

Substantially for the reasons set forth in Judge Haynsworth's dissenting opinion when the case was before the panel, we hold the district court's dismissal was appropriate. We read §706(f)(1) in these circumstances to preclude suits by individuals who are charging parties, but who have not intervened in the pending EEOC action in their behalf, once the EEOC action has been concluded by a consent decree.

Under §706(f)(1) right-to-sue letters may be issued by the Commission to charging parties under several different circumstances, but there is no provision for the issuance of such a letter under any circumstance after the EEOC has filed an action on behalf of the charging parties. As noted by the panel dissenter, there must be an exception if the EEOC's action is concluded on technical grounds without a judgment on the merits. In every sense, however, this consent decree was a judgment on the merits, and it awarded benefits which were then available to the charging parties.

The statutory scheme is fair and reasonable. A charging party has an unqualified right to intervene in the EEOC's action. If he wishes to participate in settlement negotiations or to have the right to reject

any settlement agreement negotiated by the EEOC, he may fully protect himself by intervening. If he does not intervene, it is not unfair to him to conclude that he placed the conduct of the litigation entirely upon the EEOC and expressed a conclusive willingness to be bound by the outcome, whether or not the outcome was negotiated.

General Telephone Co. of the Northwest, Inc., v. EEOC, 446 U.S. 318 (1980), is not to the contrary. In that case the employer had sought a ruling that the EEOC could not obtain broad class relief without compliance with Federal Rule of Civil Procedure 23. There were only four charging parties in that case, but there were allegations of pervasive discrimination affecting a great many persons. In those circumstances, if

the EEOC were required to comply with rule 23, the efficacy of the EEOC's §706(f)(1) remedy would be substantially impaired. Thus, the Supreme Court observed that it was "unconvinced that it would be consistent with the remedial purpose of the statutes to bind all 'class' members . . . by the relief obtained under an EEOC judgment or settlement against the employer." Id. at 333.

The question before the Supreme Court in General Telephone was exclusively related to the effect of a possible judgment upon persons who were not charging parties and who had no right of intervention. The Court's dicta must be read as referable to them and entirely inapplicable to the question of the perclusive effect of a judgment upon charging parties who had not exercised their

right of intervention.

Our interpretation of §706(f)(1) is not unprecedented. See e.g., Jones v. Bell Helicopter Co., 614 F.2d 1389 (5th Cir. 1980); McClain v. Wagner Electric Corp., 550 F.2d 1115 (8th Cir. 1977); Crump v. Wagner Electric Corp., 369 F. Supp. 637 (E.D. Mo. 1973). Cf. Truvillion v. King's Daughters Hospital, 614 F.2d 520 (5th Cir. 1980).

There has been some expression of concern among our dissenting brothers that a charging party may not recognize any reason to intervene in an EEOC action before an undesirable consent decree has been entered, by which time the right to intervene will have been lost. We appreciate their concern, but cannot change the plain meaning of §706(f)(1). Moreover, one who wishes to

participate in tactical decisions which may substantially affect the outcome of the litigation or in settlement negotiations has reason for early intervention. In this, as in many other situations, one who invokes administrative and judicial machinery in his behalf should have a continuing interest or participation in it. If he does not intervene and leaves it to the EEOC to do whatever seems best to the EEOC for him, he should not be heard to complain of the consequences of his own indifference.

The judgment of the district court is affirmed.

AFFIRMED

WIDENER, Circuit Judge, concurring:

I concur in the en banc opinion in this case.

I agree with all that it says going to the merits of the question before us.

In concurring, however, I note a possible procedural difficulty not yet fully resolved by this court which might change the result of this case. In the case of Arnold v. Eastern Airlines, No. 80-1245, et al, on December 23, 1982 the en banc court entered an order which, temporarily at least, granted rehearing in that case. The vote of that en banc court of course is binding upon us. The vote in that case was 5 for rehearing en banc and 4 against, with one disqualification. After the vote was taken in that case, one of the judges who had voted

against rehearing took senior status, further complicating that matter.

In the case before us, 5 judges voted for rehearing en banc and 4 voted against, with one disqualification.

It is arguable, of course, that rehearing in this case was not properly authorized under 28 U.S.C. §46(c) as the authorities cited in the Arnold order I have above referred to discuss.

I mention these matters in order to bring them to the attention of the parties, and note that they will be briefed and argued in the Arnold v. Eastern Airlines case.

Judge Phillips authorizes me to state that he is in agreement as to the procedural part I mention, but not as to the merits of the matters before us as to which he

is filing a dissenting opinion.

PHILLIPS, Circuit Judge, dissenting:

I respectfully dissent for the reason expressed in the superseded panel opinion, 678 F.2d 1190, which held that plaintiffs' individual rights of action were not terminated by the institution of an EEOC action nor precluded by the entry in that action of a consent judgment to which they were not parties and whose terms they had affirmatively rejected. I continue to believe (as presumably does the EEOC, the federal agency charged with enforcing the statutory scheme in issue) that under the circumstances the EEOC was entitled under §706(f)(1) to issue to these plaintiffs the right-to-sue letters upon which this action was brought

and that the underlying rights of action are subsisting ones.

With all deference, nothing said in the per curiam opinion of the en banc court dissuades me from the interpretation given the controlling stautory provision by the original panel decision. As the majority opinion notes, those of us in dissent are particularly concerned that the contrary interpretation now reached imposes an utterly unrealistic burden upon Title VII charging parties. Under that interpretation, charging parties are required at their peril, and unaided by the principals, to follow the course of agency-employer conciliation or "settlement" efforts closely enough to protect their individual interests by formal intervention if, following institution of an

agency action, those negotiations seem headed toward an unfavorable settlement.

There is nothing in the relevant statutory framework that lays upon the EEOC or the employer any obligation to keep charging parties advised of the details of those negotiations; of whether any "settlement" is imminent; of whether any settlement under consideration is to be expressed in a conciliation agreement or in a consent judgment; of the details or even the substance of a "settlement" that has been informally reached and remains only to be formalized by either means; of whether and when an agency action is to be commenced; of the fact that one has been commenced; or of anything else about the course of agency-employer dealings. The formal agency

documents on file and a part of the record in this case contain no information along these lines of which charging parties might be held to have constructive notice. On oral argument we were given to understand by counsel for the EEOC, appearing as amicus, that the agency does not consider itself under any obligation and does not routinely keep all charging parties even generally apprised of the course of its conciliation-"settlement" negotiations. Certainly there is no suggestion that in this case - where presumably the normal course of proceedings was followed - these charging party-plaintiffs were ever sufficiently advised along these lines to make an informed decision that they must formally intervene - with the attendant

expense - in order to protect their interests against an imminent consent judgment that did not satisfactorily protect them.

To the plain difficulty created for charging parties by its interpretation the en banc majority - which commendably concedes the difficulty - has only the meager response that the law after all affords these and comparably situated claimants the same means to protect their interests vis-a-vis agency action in their behalf that it does all persons in whose behalf federal agency action is undertaken. When the practicalities of the real-life situation involving these and comparably situated Title VII charging parties in their relation to EEOC-employer negotia-

tions are frankly recognized, this assessment calls to mind - though with none of its implications of callousness - Anatole France's wry comment about actual as opposed to apparent impartiality of the law's general reach.[1]

If to all this it be rejoined that it is not our function to re-write statutues to cure perceived difficulties but simply to apply them according to their plain import, my response remains as it was in the panel majority opinion: that the dispositive statutory provision here is sufficiently ambiguous to require judicial

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1. "The law, in its majestic equality, forbids the rich as well as the poor to sleep under bridges, to beg in the streets, and to steal bread." A. France, Le Lys Rouge ch. 7 (1894), quoted in J. Cournos, A Modern Plutarch 27 (1928).

interpretation drawing on the traditional aids. Among those traditional aids - in addition to the legislative history specifically alluded to in the panel opinion, see 678 F.2d at 1193-94 - is that ancient and honorable canon of construction that when a literal interpretation ("conciliation" means only "conciliation") would lead to mischievous consequences, legislative intent is properly sought at deeper levels of purpose. See J. Sutherland, Statutes and Statutory Construction §363 (2d ed. 1904). I continue to believe that in General Telephone Co. of the Northwest, Inc. v. EEOC, 446 U.S. 318 (1980), the Supreme Court, by the clearest possible implication, and perhaps drawing sub silentio upon that canon, has already

rejected the narrowly literal interpretation of §706(f)(1) for which Proctor & Gamble has contended and which the en banc majority now adopts. See 678 F.2d at 1194-95 & n.7. The General Telephone Court's careful discussion of the practical means by which employers entering into Title VII consent judgments with the EEOC may protect themselves against the private claims of employees - including charging parties - who may later reject the agency-employer settlement, see General Telephone, 446 U.S. at 333 & n. 15, is sensible only if it assumes that such judgments are not legally binding on those employees and that the employees' private rights of action are not terminated by mere institution of agency actions under

§706.

I am authorized to say that Chief Judge Winter and Judge Sprouse join in this opinion.

PANEL OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT HEREIN

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 81-1197

- -

[SAME TITLE]

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Appeal from the United States District Court for the District of Maryland, at Baltimore. Edward S. Northrop, District Judge.

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Argued November 6, 1981

Decided May 18, 1982

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Before HAYNSWORTH, Senior Circuit Judge, PHILLIPS and SPROUSE, Circuit Judges.

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Sidney Blum for Appellants; Colleen M. O'Connor (Leroy D. Clark, General Counsel, Philip B. Sklover, Acting Associate General Counsel, Vincent Blackwood, Assistant General Counsel on brief) for Amicus Curiae; John A. McGuinn (Guy Farmer, Farmer, Wells, McGuinn, Flood, Sibal & Bechtel; Thomas B. Eastman, Ober, Grimes & Shriver; T.L. Overbey, Legal Department, The Proctor & Gamble Manufacturing Co. on brief) for Appellee.

PHILLIPS, Circuit Judge:

In 1976 the EEOC brought an employment discrimination action under § 706(f)(1) of Title VII, 42 U.S.C. § 2000e-5(f)(1)[1] (1976), against Proctor & Gamble, on behalf of more than two dozen employees who had filed charges with the agency. During the three-year discovery period that followed no Proctor & Gamble employee availed herself of the statutory right under § 706(f)(1)

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1. In pertinent part, that subsection provides:

(f)(1) If within thirty days after a charge is filed with the Commission . . . , the Commission has been unable to secure from the respondent a conciliation agreement acceptable to the Commission, the Commission may bring a civil action against any respondent not a goverment, govermental agency, or political subdivision named in the charge. . . . The person or (Cont'd)

to intervene in the agency's civil action. Settlement negotiations between the agency and the employer eventually resulted in a consent decree.

During the final stages of those negotiations the parties to the litigation took different positions concerning the effect of any consent decree on potential private rights of action against Proctor &

(cont'd) persons aggrieved shall have the right to intervene in a civil action brought by the Commission. . . . If a charge filed with the Commission pursuant to subsection (b) of this section is dismissed by the Commission, or if within one hundred and eighty days from the filing of such charge . . . , the Commission has not filed a civil action under this section . . . , or the Commission has not entered into a conciliation agreement to which the person aggrieved is a party, the Commission. . . shall so notify the person aggrieved and within ninety days after the giving of such notice a civil action may be brought against the respondent named in the charge (A) by the person claiming to be aggrieved . . . .

Gamble by aggrieved individual charging parties. The EEOC asserted that the charging parties were only potential witnesses in its agency action and what therefore the settlement decree would not cut off individual rights of action for those persons refusing to sign a release in return for compensation under the settlement. The agency told the company that it intended to issue right-to-sue letters to employees who did not accept monetary awards under the consent decree. The company maintained that the settlement applied to the entire class of affected employees and that the agency's institution of suit on their behalf precluded subsequent private § 706 suits on the same issues.

In mid-1980 the EEOC issued right-to-sue

letters to those charging parties who had rejected awards under the decree. Sixteen Proctor & Gamble workers then sued individually within the appropriate statutory period. The district court granted the company's motion to dismiss on the basis that the right-to-sue letters were invalidly issued. The employees appealed that dismissal and, with the EEOC as amicus, contend that agency settlement of § 706 litigation does not bar subsequent private actions by aggrieved employees unwilling to accept terms of the resulting consent decree. Proctor & Gamble urges that the statutory language of § 706 expressly precludes the EEOC from issuing right-to-sue letters to charging parties after the Commission has instituted its own action, and that the

private interests of the charging parties are fully protected by their absolute right of intervention under § 706 (f)(1).

We hold that the private rights of action of the plaintiff-employees were not terminated by the institution of the § 706 agency action or the resulting consent decree and that the EEOC could properly issue them right-to-sue letters. We therefore reverse and remand for further proceedings.

I

We think that acceptance of the position urged by the employee-plaintiffs and the EEOC as amicus is compelled by the legislative history surrounding the 1972 grant to the EEOC of enforcement power through agency actions under §706; a comparison to related enforcement provisions in other labor legis-

lation; Congress' obvious intent to provide for parallel and possibly overlapping remedies under Title VII; and the Supreme Court's recent analysis of the intended operation of §706 (f)(1) in General Telephone Co. of the Northwest, Inc. v. EEOC, 446 U.S. 318 (1980).[2]

The 1972 ammendments to Title VII expanded the EEOC's original role as conciliator by vesting the agency with authority under §706 to file its own actions on behalf

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2. Also pointing to this as the proper judicial construction of the concededly ambiguous statutory language is the EEOC's own interpretation - as reflected in its action in the case and its position formally taken as amicus on this appeal. Courts owe "great deference to the interpretation given the statute by the officers or agency charged with its administration." EPA v. National Crushed Stone Ass'n, 449 U.S. 64, 83 (1980), citing Udall v. Tallman, 380 U.S. 1, 16 (1965).

of employees who lodged formal charges with the agency. At the same time, the amended §706 (f)(1) still authorized aggrieved employees to prosecute private actions. But that authorization was explicity conditioned on receipt by the employees of right-to-sue letters from the EEOC, and the EEOC's right to issue right-to-sue letters was in turn conditioned upon the existence of one of three disjunctively stated circumstances. The first two of these - that the EEOC had dismissed the charge or not filed an agency action within 180 days of the charge - are concededly not applicable here. Whether the third condition exists is the dispositive issue. Under it, a right-to-sue letter can be issued "If . . . the Commission has not entered into a conciliation agreement to

which the person aggrieved is a party."

There is no dispute - though the statutory language is not the clearest - that this permits the issuance of a right-to-sue letter to any individual charging party who is not "a party" to an extra-judicial "conciliation" agreement. Nor is it disputed that the refusal to accept any individual award provided by such an agreement makes one not "a party" to it within the meaning of this provision. Proctor & Gamble, contending for a narrowly literal interpretation of the language, says that this is the limit of what it means: that it does not authorize the issuance of a right-to-sue letter to any employee once an agency action is filed ntowithstanding the employee may have declined to intervene in the action and has affirmatively rejected

any award authorized by a consent decree entered in the action.[3]

We disagree with this interpretation.

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3. There is, concededly, both lower court and text-writer support for the employer's position. See, e.g., McClain v. Wagner Electric Corp., 550 F.2d 1115 (8th Cir. 1977); and see generally 2 Larson, Employment Discrimination §49.43, at 9B-83 (1981), citing Crump v. Wagner Elec. Corp., 369 F. Supp. 637 (E.D. Mo. 1973) (where individual filed suit prior to EEOC settlement); Player, Federal Employment Discrimination in a Nutshell §5-7.02, at 234 (2d ed. 1981).

For reasons stated in this opinion, we simply disagree with these authorities, and particularly with those pre-General Telephone decisions relied upon by Proctor & Gamble in which the courts concluded that the threat of duplicative lawsuits required finding private rights of action terminated by the filing of EEOC actions. See McClain v. Wagner Elec. Corp., 550 F.2d 1115 (8th Cir. 1977); Crump v. Wagner Elec. Corp., 369 F. Supp. 637 (E.D. Mo. 1973).

We conclude instead that the statute contemplates that any charging party who has declined to intervene as a formal party in an agency action and who has also declined to accept any individual monetary award provided by a consent decree entered in the action may be issued a right-to-sue letter under §706(f)(1).

A.

In the first place, we think that the legislative history of §706 reflects a Congressional determination that the filing of a civil action by the EEOC should not automatically terminate private rights of action. When the House and Senate were considering granting the EEOC cease-and-desist authority instead of the authority merely to maintain enforcement actions, Congress

expressly indicated that the exercise of cease-and-desist power would cut off private rights of action: "[t]he right of an aggrieved person to bring a civil action . . . shall terminate once the Commission has issued a complaint . . ." See S. Rep. No. 92-415, 92 Cong., 1st Sess. 49 (1971), reprinted in Legislative History of the Equal Employment Opportunity Act of 1972 392 (1972) (hereinafter Leg. Hist.). That termination clause was deleted when §706 was further amended to authorize the EEOC only to maintain enforcement actions in the courts.

Significantly, the amended Senate bill at first premised the private right of action on EEOC failure to initiate civil action: "If the Commission fails to

obtain voluntary compliance and fails or refuses to institute a civil action . . . within 180 days . . . a civil action may be brought [by the charging party] . . ." 118 Cong. Rec. 1068 (1972), Leg. Hist. 890 (emphasis added). But that conjunctive language fell away with Senator Javits' emendation, which was eventually adopted as the current language of §706(f)(1).[4] Senator Javits expressed his concern for protecting the rights of charging parties where the EEOC obtains a compromise satisfactory to the Commission but not necessarily

4. The Javits amendment, offered to amend Senator Dominick's proposed amendment No. 611, was incorporated into a second Dominick amendment, No. 884. 118 Cong. Rec. 1067-68, Leg. Hist. 889-90; 118 Cong. Rec. 3379, Leg. Hist. 1557.

responsive to the interests of individual employees.

> Obviously, some element of consent or what is tantamount to it, is urgently necessary in terms of common equity if you are not to get into a situation where you cut off a complainant's right and the complainant cannot do anything about it and the agency which cut off his right is a party to the settlement.

118 Cong. Rec. 068, Leg. Hist. 891.

The Joint Conference analysis of the bill which was eventually enacted in 1972 approached the third clause in §706(f)(1) from a broad perspective: the three circumstances described in §706 were said to "allow the person aggrieved to pursue his or her remedy under [Title VII] in the courts where there is agency inaction, dalliance or dismissal of the charge, or unsatisfactory resolution." 118 Cong. Rec. 7168, Leg. Hist. 1847 (emphasis

added). There is no basis in legislative history for concluding that Congress intended that only unacceptable pre-suit settlements, and not unacceptable consent decrees entered after formal commencement of an agency action, should keep private rights of action alive.

In further support of this analysis, the employees and the EEOC point to other remedial statutes in which Congress, intending automatic termination of private right to sue upon the commencement of judicial action by an agency, expressly so provided.[5] Coupled

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5. See Age Discrimination in Employment Act of 1967, §7(c), 29 U.S.C. §626(c) ["the right of any person to bring such an action shall terminate upon the commencement of an action by the Secretary. . ."]; Fair Labor Standards Act of 1938, as amended, (1974), §16(c), 29 U.S.C. §216(c) ["the right . . . to bring an action . . . and . . . to become a party plaintiff to any such action (cont'd)

with the fact, discussed above, that Congress considered such a provision in a preliminary version of §706 and failed to enact it, we find this statutory comparison persuasive of the point urged - that here Congress did not intend automatic termination.

B

Next, we think that Supreme Court readings of Title VII in general and of §706 in particular support this interpretation. The Court early found in Title VII "a general intent [by Congress] to accord parallel or overlapping remedies against discrimination," Alexander v. Gardner-Denver Co., 415 U.S. 36, 47 (1974). In recognition of this general remedial purpose, the Court has recently

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(cont'd) shall terminate upon the filing of a complaint by the Secretary . . ."].

suggested that, given "the possible differences between the public and private interests involved" in EEOC and private actions under §706 it is "unconvinced that it would be consistent with the remedial purposes of the statutes to bind all 'class' members with discrimination grievances against an employer by the relief obtained under an EEOC judgment or settlement against the employer." General Telephone Co., 446 U.S. at 333 (emphasis added).[6]

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6. Directly at issue in General Telephone was the question whether an EEOC action under §706 must be structured as a class action. The employer in that case contended that it must be so structured, with the obvious purpose, recognized by the Court, of insuring preclusion of all 'class' member claims by any resulting decree. See General Telephone, 446 U.S. at 332-33. It was in the course of rejecting this contention that the Court discussed the relationship between the private rights of action and the agency right of action conferred by §706, and (cont'd)

More particularly, in General Telephone the Court seemed specifically to read the disputed provision of §706(f)(1) in the way urged here by the employees. Discussing the relationship between agency and private rights of action under §706, the Court said that "[u]nder §706(f)(1), the aggrieved person may bring his own action . . . if the agency has . . . reached a conciliation or settlement agreement with the [employer] that the party finds unsatisfactory." Id. at 326 (emphasis added). By this reading the Court seems to understand that under §706(f)(1) "conciliation agreement" means any form of negotiated settlement of §706 charges by the EEOC

(cont'd) concluded that the statute contemplates their essential independence despite the possibilities for duplicative litigation that this entailed.

and, further, that not being "a party" to such an agreement means simply rejecting or not accepting its terms.

This is further borne out by the General Telephone Court's forthright acceptance of the threat of multiple suits that this interpretation creates. Addressing this possibility, the Court was at pains to suggest practical means for avoiding it by other devices than the direct one of simply giving class-action type preclusive effect to any judgment entered in an agency §706 action. The Court suggested that a reasonable safeguard against multiple suits might be a court requirement that any employee claiming under an EEOC judgment be made "to relinquish his right to bring a separate private action." Id. at 333. In the same

way, The Court observed, "(a)n acceptance of the benefits under an EEOC-negotiated settlement could be drafted to provide for a similar relinquishment." Id. at 333 n.15.[7] Implicit to us in this suggestion is its obverse, that rejection

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7. This deliberate reaching out by the Supreme Court to recognize that under the statutory scheme employers may need practical protection against individual claims following "an EEOC-negotiated settlement" is at apparent odds with our dissenting Brother's perception that Congress could not have intended a non-binding effect for consent decrees. The specific suggestion is that the resulting disincentive to settle agency actions could not accord with congressional intent, given the general preference for conciliation reflected in the statutory scheme. Conceding the anomaly, it applies as well to the conciliation stage, where, as all agree, this very disincentive is built into the scheme. The greater anomaly would be to treat differently a conciliation agreement formally entered into without filing an agency action and one reached in all essential parts before and merely (cont'd)

of individual benefits under an EEOC consent decree with concomitant refusal to release private rights results in retention of those rights as the decree rights are foregone. That, of course, is what the plaintiff-employees did here.

C

In a fall-back or alternative position Proctor & Gamble contends that

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(cont'd) formalized as a "consent decree" shortly after pro forma filing of an action.

The Northwest Telephone dictum seems plainly to be saying to employers that in view of the non-binding quality of agency "settlement" at any stage they must seek protection outside the statute's operation, and that to the extent protection cannot be privately negotiated they should consider seriously the advantage to be gained by settlement.

failure of the plaintiffs to intervene in the EEOC action - as they could of right under § 706(f) - should be held a waiver of their private rights of action in any event. There is no statutory or Supreme Court authority for this proposition and we reject it. In the first place, despite occasional suggestions of the possibility, see, e.g., Provident Tradesmens Bank & Trust Co. v. Lumbermen's Mutual Casualty Co., 390 U.S. 102, 114 (1968); and see generally Note, Preclusion of Absent Disputants to Compel Intervention, 79 Col. L. Rev. 1551 (1979) (advocating adoption of principle under due process safeguards, but recognizing that it is not now generally applied), there is no specific procedural rule nor

generally recognized principle of compulsory intervention comparable to those which, at peril of preclusion, compel certain counterclaims in federal practice. See Fed. R. Civ. P. 13(a). More particularly with reference to the intervention right provided by § 706(f)(1), the Supreme Court has recently identified as its purpose the provision of opportunity for charging parties to assert their competing individual interests in the context of a "unified" EEOC action in which "the most satisfactory overall relief" may be the goal. General Telephone, 446 U.S. at 331. Nothing in that rationale suggests that the Court reads § 706 to cut off private rights of

action in the event that individual charging parties do not choose to assert those competing interests by intervention in the EEOC action.[8]

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8. Closely related, indeed possibly dependent upon this view of the consequences of the statutory right to intervene, is the dissent's suggestion that ordinary principles of res judicata suffice to preclude the individual claims here. Consent decrees, it is pointed out, have the same claim preclusive effect as do fully litigated judgments; in consequence, the final consent decree here must have that effect (presumably independently of the agency's statutory right to trigger individual "rights to sue"). That general principle is of course well established, Restatement (Second) of Judgments § 18(1), comment a (1982), but its application under classic doctrine presupposes that the persons against whom it is invoked were either parties to the earlier decree or are otherwise legally bound by it, id. §§ 34, et seq., and at this very point the inquiry under classic res judicata doctrine dead-ends. It has recently (cont'd)

II

Because the EEOC was authorized to issue the right-to-sue letters in the instant case, the district court erred in dismissing the claims based upon a contrary conclusion. The judgment is therefore vacated and the action remanded for further proceedings consistent with this opinion.

VACATED AND REMANDED.

(cont'd) been recognized that the question whether non-parties to an agency action, such as plaintiffs here, should be considered legally bound by the agency action is one that "cannot be determined by reference to res judicata policies alone." Id. Reporter's Note to § 41, comment d. The answer finally turns rather on whether the agency's authority is regarded as preemptive, id. comment d, (cont'd

HAYNSWORTH, Senior Circuit Judge, dissenting:

I would affirm, substantially for the reasons stated by Judge Northrop in an unreported opinion in this case.

The statute seems plain to me that a right to sue letter may not issue if the Commission has filed a suit within one hundred eighty days after the filing of the charge. I am confident there is an implicit exception if the EEOC action is terminated on a basis which would give the judgment no preclusive effect, but a consent decree does have a preclusive effect, and I would not exempt non-

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(cont'd) Illustration 7, and this in turn on the question of congressional intent to which our analysis is solely directed.

consenting charging parties who have not intervened in the action.

The statute does authorize a right to sue letter to a charging party if the Commission has entered into a conciliation agreement and the aggrieved person does not accept its benefits. That is clearly referable, however, to conciliation agreements reached during the conciliation process and not to consent decrees entered for the termination of litigation. An aggrieved person has no right to participate in the negotiation of a conciliation agreement. Once the EEOC files a § 706 action, however, a charging party has an absolute statutory right to intervene. If he exercises that right, he has the right to participate in settle-

ment negotiations and to reject an agreement satisfactory to the EEOC but not to the individual claimant. If he does not exercise the right to intervene, the claimant should be held to have authorized the EEOC to enter into a settlement agreement upon his behalf.

In this case, sixteen claimants rejected the benefits provided for them by the consent decree and joined in this action.* None of the sixteen were intervenors in the § 706 action. If they may now maintain individual actions, employers will have little or no incentive to settle § 706 actions brought by the EEOC. If such a

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* Apparently, there were nine or ten other complainants. I am uncertain what happend to them.

settlement binds no claimant, a settlement with EEOC can produce little advantage to the employer while creating a possible floor for future negotiations with attorneys for individual claimants. In the midst of trial, an employer would find no settlement opportunity attractive, for it would know that any beneficiary, who had not intervened, could put it to trial all over again.

The policy favoring settlement of law suits underlies the statutory distinction between conciliation agreements and consent decrees. It reinforces the considerations of fairness which distinguish between claimants who cannot participate in the negotiation of conciliation agreements and those who, by intervention in a

pending § 706 action, can participate.

I read all of the references in the legislative history to non-preclusion as referable to conciliation agreements, which surely was the principal thing in the minds of the members of Congress.

There is language in General Telephone Co. v. EEOC, 446 U.S. 318, which gives me great pause. The question here was not presented there, however. The Supreme Court there was reviewing a decision of the Ninth Circuit holding that the requirements of Rule 23 of the Federal Rules of Civil Procedure were inapplicable to any action brought by the EEOC under § 706. If the numerosity and other requirements of Rule 23 were applicable to such an action by

the EEOC, the effectiveness of the remedy would be greatly impaired. The employer there had sought a holding that Rule 23 applied in order to assure that any judgment would be preclusive of individual claims. There were only four charging parties, but the EEOC alleged apparently pervasive sex discrimination in four western states. Unless Rule 23 were applicable and the class certified, a judgment could not bind potential beneficiaries who had filed no charges and who had not accepted the benefits of the judgment. The dicta have no relevance to the question of the preclusive effect a judgment may have on charging parties, unless one reads the dicta as having been written with

attention focused upon the four charging parties, who went unnoticed in that part of the opinion. If the statement were written as applicable to the four charging parties, then the premise of no preclusive effect was an unlitigated assumption. Here on the other hand, the question is the center of this controversy, or would be if everyone involved in this case did not agree that a judgment, as distinguished from a consent decree, would preclude subsequent individual claims by charging parties who had not intervened.

Thus I read the Supreme Court's dicta as referring to members of the class who had filed no charges.

The statute clearly makes conciliation

agreements not binding upon non-consenting claimants. Materials in the legislative history supporting that provision should not be construed as giving a similar effect to consent decrees. After all, a consent decree is a formal judgment which, in the absence of compelling evidence from the Congress, should be given the same preclusive effect as a judgment entered by a court upon its own findings of fact and conclusions of law. In this case, no party suggests that such a judgment, without consent, would not bind charging parties who had not exercised their right of intervention. The EEOC specifically states in its brief that a judgment after full litigation would have a preclusive

effect. Surely, within the normal rules of preclusion, the Agency represents the charging parties upon whose behalf and for whose benefit the action is brought.

For these reasons, I dissent.

OPINION OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MARYLAND HEREIN

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

GENEVIEVE S. ADAMS; LOUISE BERTHA; ALGERIE R. (kelley) BRIGERMAN; ANNE BROWN; CARRIE B. CHAFFIN; LEILA B. HARTHANSON; LORETTA M. HINKLE; NELLIE KERN; MARTHA McGINN; BERTHA MABRAY; ANNA M. MILLER; DOROTHY N. SHAWKER; CLARETHA SMITH; LORRAYNE M. SOETHE; MARGIE STOVER; SHIRLEY S. SUNDERLAND; ETHEL WIMPLING	:
v.	:
THE PROCTER & GAMBLE MANUFACTURING CO.	:

CIVIL ACTION NO. N-80-2188

MEMORANDUM

In December 1976, the Equal Employment Opportunity Commission (hereinafter the "EEOC") instituted an action in this Court against Procter & Gamble Manufacturing Company (hereinafter the "defendant") alleging employment discrimination in

violation of § 706 (f)(1) of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-5(f)(1). This case, docketed as N-76-1818, was settled by a consent decree entered on January 4, 1980. The EEOC subsequently issued "right-to-sue" letters to the charging parties who declined the terms of the decree. On August 18, 1980, sixteen of the seventeen charging parties who received these notices instituted the present action.[1]

Presently before this Court is

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1. In addition, Bertha Mabray was named as a plaintiff in the complaint. No one concerned with the instant case, including plaintiffs' counsel, is familiar with the status of this plaintiff. Two possibilities exist. The EEOC either did or did not issue a right-to-sue letter to Bertha Mabray. If the EEOC properly issued a right-to-sue letter to her, she falls in the same category as the other plaintiffs in this case, and the present ruling is equally (cont'd)

defendant's motion to dismiss. The heart of this motion is whether the EEOC properly issued right-to-sue letters following the entry of a consent decree in a suit initiated by the EEOC under § 706(f)(1).[2] This Court believes that the filing of suit by the EEOC and the entry of a consent decree in that action cut off the right of the charging parties to initiate their own action under Title VII.

(cont'd) applicable to her. If, on the other hand, a right-to-sue letter was never issued to Bertha Mabray, her claim in the present action is jurisdictionally defective. See note 2 infra.

2. The existence and service of a properly issued letter is a jurisdictional prerequisite to the institution of a private cause of action under Title VII. See Nilsen v. City of Moss Point, 621 F.2d 117, 120 (5th Cir. 1980); Hiduchenko v. Minneapolis Medical and Diagnostic Center, Ltd., 467 F. Supp. 103, 107 (D. Minn. 1979).

In enacting the enforcement provisions of Title VII, Congress was concerned with precluding duplicative litigation. Section 706(f)(1) provides in relevant part as follows:

> If a charge filed with the Commission... is dismissed by the Commission, or if within one hundred and eighty days from the filing of such charge or the expiration of any period of reference under subsection (c) or (d) of this section, whichever is later, the Commission has not filed a civil action under this section ... the Commission ... shall so notify the person aggrieved and within ninety days after the giving of such notice a civil action may be brought against the respondent named in the charge ....

This language clearly suggests that private individuals can only initiate a Title VII action when the EEOC has not filed a prior action. It is important to note, however, that § 706(f)(1) safeguards the

interests of individual employees when. the EEOC elects to sue by providing the individuals with a right to intervene in the EEOC suit. The statutory right to intervene serves the dual purpose of protecting the interests of the private parties and preventing duplicative proceedings.

The House of Representatives' report on the 1972 Amendments to the Civil Rights Act of 1964 discussed the relationship between public and private enforcement of Title VII as follows:

> The committee was concerned about the interrelationship between the newly created cease and desist enforcement powers of the Commission and the existing right of private action. It concluded that duplication of proceedings should be avoided. The bill, therefore, contains a provision for termination of Commission jurisdiction once a

> private action has been filed (except for the power of the Commission to intervene in the private actions). It contains as well a provision for termination of the right of private action once the Commission issues a complaint or enters into a conciliation or settlement agreement which is satisfactory to the Commission and to the person aggrieved. If such an agreement is not acceptable to the aggrieved party, his private right of action is preserved.

H. REP. NO. 238, 92d Cong., 2d Sess., reprinted in (1972) U.S. CODE CONG. & AD. NEWS 2137, 2148. According to this report, therefore, an individual's right to institute a private action terminates once the EEOC files a complaint.[3]

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3. In Truvillion v. King's Daughters Hosp., 614 F.2d 520 (5th Cir. 1980), the United States Court of Appeals for the Fifth Circuit recognized that the filing of suit does not bar a subsequent private action when the EEOC (cont'd)

The United States Court of Appeals for the Eighth Circuit, in McClain v. Wagner Electric Corp., 550 F.2d 1115 (8th Cir. 1977), seems to be the only court to have squarely addressed the issue presented here.[4] In McClain, a discharged employee instituted a civil rights action charging

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(cont'd) suit was dismissed for failing to meet jurisdictional prerequisites. When the dismissal has no res judicata effect as to the EEOC, therefore, it has none with respect to a charging party. Id. at 526-27. The Court noted, however, that this case presented "unusual circumstances" and under normal conditions, the filing of a suit by the EEOC precludes the institution of a separate action by a private party. Id. at 521, 526.

4. The United States Court of Appeals for the Fifth Circuit has, however, demonstrated a willingness to follow the Eighth Circuit's decision in McClain. See, e.g., United States v. Allegheny-Ludlum Indus., Inc., 517 F.2d 826, 870 n.62 (5th Cir. 1975), cert. denied, 425 U.S. 944 (1976); Truvillion, supra at 526.

a variety of discriminatory employment practices. Defendant filed a motion to dismiss claiming a previously filed EEOC action cut off plaintiff's right to bring a separate action. As in the instant case, the prior EEOC suit in McClain was disposed of by a consent decree. The Eighth Circuit held that the individual employees did not have a right to institute a separate action, stating:

> In EEOC v. Missouri Pacific R.R., (493 F.2d 71 (8th Cir. 1974)), we held that duplicative suits by the Commission and by employees cannot be maintained under § 706 of the Act. Thus, if the Commission sues first, individual employees are not permitted to sue independently but may intervene as of right in the Commission's suit as provided by Fed. R. Civ. P. 24(a). If a private suit by an employee or employees is instituted prior to the filing of a suit by the Commission, the Commission's remedy is limited to permissive

> intervention under Rule 24(b) in the employees' suit, at least where the claims asserted by the Commission are no broader than those set out in the employees' suit.
>
> Accordingly, we now hold that the plaintiff had no right to maintain his 1975 suit, and that his remedy was by way of intervention as of right in the 1973 suit.

Id. at 1119.

The myriad cases cited by the EEOC in its amicus brief are not on point. The holding in Doninger v. Pacific Northwest Bell, 564 F.2d 1304 (9th Cir. 1977), was limited to the issue of class certification. The Doninger court only addressed the issue of the viability of a private right of action in dicta. The remaining cases cited involve § 707 "pattern or practice" actions, not suits brought pursuant to

§ 706(f)(1). See Eirhart v. Libbey-Owens-Ford Co., 616 F.2d 278 (7th Cir. 1980); United States v. Allegheny-Ludlum Indus., Inc., supra; Rodriquez v. East Texas Motor Freight, 505 F.2d 40 (5th Cir. 1974); Williamson v. Bethlehem Steel Corp., 468 F.2d 1201 (2d Cir. 1972), cert. denied, 411 U.S. 931 (1973). Moreover, both Eirhart and Williamson involved § 707 suits initiated by the Attorney General before the 1972 Amendments were in effect.

Actions instituted pursuant to § 707 vary substantially from those initiated under § 706(f)(1). Under § 707, the EEOC may initiate a "pattern or practice" action when it has "reasonable cause" to believe the suit is necessary. See United

States v. Jacksonville Terminal Co., 451 F.2d 418, 438 (5th Cir. 1971), cert. denied, 406 U.S. 906 (1972). The Fifth Circuit explained the interrelationship between § 707 and § 706 as follows:

> Section 707 does not make it mandatory that anyone file a charge against the employer or follow administrative timetables before the suit may be brought. It was unquestionably the design of Congress in the enactment of § 707 to provide the government with a swift and effective weapon to vindicate the broad public interest in eliminating unlawful practices, at a level which may or may not address the grievances of particular individuals. Rather, it is to those individual grievances that Congress addressed § 706, with its attendant requirements that charges be filed, investigations conducted, and an opportunity to conciliate afforded the respondent when "reasonable cause" has been found.

Alleghehy-Ludlum, supra at 843 (citations omitted).

In bringing an action under § 706(f)(1), the EEOC does not stand in the shoes of the individual employees. See General Telephone Co. v. EEOC, 446 U.S. 318 (1980). In addition to acting to secure relief for the aggrieved individuals, the EEOC acts to eliminate discrimination in a manner consistent with the public interest. It is because the EEOC acts in a public capacity that Congress deemed it necessary to provide the individual employees with a right to intervene in § 706 suits. Congress did not, however, give the individuals the option to either intervene in the EEOC action or bring a separate action.

Although individual employees have

a right to intervene in actions commenced by the EEOC pursuant to § 706(f)(1), such a right does not exist when the EEOC institutes a § 707 "pattern or practice" action. When the EEOC sues under § 707, the aggrieved individuals can only intervene with the court's permission, as provided by Rule 24(b) of the Federal Rules of Civil Procedure. See United States v. Allegheny-Ludlum Indus., Inc., supra at 842-46. Because the individual employees lack a right to intervene in § 707 "pattern of practice" actions, a consent decree agreed upon between the employer and the EEOC in such an action is not binding on these individuals. See Eirhart v. Libbey-Owens-Ford Co., supra; United States v. Allegheny-

Ludlum Indus., Inc., supra; Rodriguez v. East Texas Motor Freight, supra; Williamson v. Bethlehem Steel Corp., supra. However, when the individuals have a right to intervene, as in § 706(f)(1) actions, consent decrees should be binding on the individuals as well as the EEOC. Consequently, the plethora of cases cited by the EEOC are inapposite.

In its amicus brief, the EEOC also argues that, as with conciliation agreements, consent decrees should not be binding on private individuals. The term conciliation agreement refers to a settlement agreement reached between the employer and the EEOC prior to the initiation of suit. A consent decree, on the other hand, is an agreement

entered into following the institution of formal proceedings by the EEOC. Conciliation agreements and consent decrees, therefore, are fundamentally different. Because the aggrieved individuals have a right to intervene in § 706(f)(1) actions, they are not forced to accept the terms of a consent decree. These individuals, however, have no right to take part in conciliation negotiations. Further, a conciliation agreement is customarily reached before substantial pretrial costs are incurred by the defendant employer. As a result, the reasons that compelled Congress to allow the aggrieved individuals to institute an action following a conciliation agreement do not exist with regard

to consent decrees entered in § 706(f)(1) actions. To provide private individuals with the right to institute a separate action after a prior § 706(f)(1) action brought by the EEOC has gone to judgment would unduly burden both the judicial system and the defendant.

For the reasons set out above, this Court believes that if a § 706(f)(1) action is instituted by the EEOC prior to the filing of suit by the individual employees, the employees' remedy is limited to its right to intervene in the prior suit. Accordingly, defendant's motion to dismiss is granted.

This ruling is equally applicable to plaintiffs' claim under 42 U.S.C. § 1981. This Court has found no case, nor have

plaintiffs or the EEOC provided reference to any case that allows a plaintiff who is barred from filing a Title VII action to institute a private action under § 1981, based on the same violations addressed in the previous EEOC suit.

The Clerk will be instructed to enter a separate Order confirming these rulings.

s/ Edward S. Northrop

Edward S. Northrop
Chief United States
District Judge

Dated: January 7th, 1981

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

CIVIL ACTION NO. N-80-2188

[SAME TITLE]

O R D E R

Consistent with the Court's oral rulings at the conclusion of the hearing herein on December 30, 1980, and for the reasons stated in the aforegoing Memorandum, IT IS, this 9th day of January, 1981, ORDERED as follows:

1. That defendant's motion to dismiss BE, and the same hereby IS, GRANTED;

2. That the complaint herein BE, and the same hereby IS, DISMISSED WITH PREJUDICE;

3. That judgment BE, and the same hereby IS, ENTERED in favor of defendant against the plaintiffs; and,

4. That the Clerk shall mail copies of this Order and the aforegoing Memorandum to counsel of record for all the parties to this action.

Edward S. Northrop
Chief United States
District Judge

ORDER HEREIN GRANTING RESPONDENT'S PETITION FOR REHEARING AND SUGGESTION FOR REHEARING EN BANC

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 81-1197

Genevieve S. Adams, et al,

Appellants,

versus

The Proctor & Gamble Manufacturing Co.,

Appellee,

E.E.O.C.,

Amicus Curiae.

/A

- - - - - - - - - - -

Appeal from the United States District Court for the District of Maryland, at Baltimore. Edward S. Northrop, District Judge

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Upon consideration of appellee's petition for rehearing and suggestion for rehearing en banc and the answer to the petition, by counsel,

IT IS ORDERED that a rehearing en banc is granted.

IT IS FURTHER ordered that the above case will be reheard en banc at the October 1982 session.

Entered at the direction of Judge Phillips.

For the Court

s/ William K. Slate, II
CLERK

FILED

AUGUST 30, 1982

U.S. Court of Appeals
Fourth Circuit

ORDER DENYING PETITIONERS' PETITION FOR REHEARING

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 81-1197

Genevieve S. Adams, et al .,

Appellant,

versus

The Proctor & Gamble
Manufacturing Co.,

Appellee.

Upon consideration of appellant's petition for rehearing, we find that the sole issue presented in the petition has been definitively decided against the appellants' position. See Arnold v. Eastern Airlines, No. 80-1245 (4th Cir., July 8, 1983) (en banc).

Accordingly, IT IS ORDERED that the petition for rehearing be and is hereby

DENIED.

FOR THE COURT EN BANC

United States Circuit Judge

FILED

AUGUST 12, 1983

U.S. Court of Appeals
Fourth Circuit

NOTICE OF JUDGMENT

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

May 18, 1982

TO: Sidney Blum, Esq.
Colleen M. O'Connor, Esq.
John A. McGuinn, Esq.
Thomas B. Eastman, Esq.

Judgment was entered in Case No. 81-1197 this date.

The Court's opinion is enclosed.

Petition for Rehearing (FRAP 40)

Filing Time

A petition may be filed within 14 days after judgment. No extension will be granted save for the most compelling reasons. Requests based on grounds such as miscalculation of time or a need to consult with others will be peremptorily denied.

Purpose

A petition should only be made to direct the Court's attention to one or more of the following situations:

1. A material fact or law overlooked in the decision.

2. A change in the law which occurred after the case was submitted and which was overlooked by the panel.

3. An apparent conflict with another decision of the Court which is not addressed in the opinion.

The filing of a petition in order merely to reargue the case is an abuse of the privilege.

Statement of Counsel

A petition shall contain an introduction stating that, in counsel's judgment, one or more of the situations exist as described in the above "Purpose Section". The points to

be raised shall be succinctly listed in the statement. Lacking such a statement, the petition will be returned to counsel without filing.

Form

The 15 page limit allowed by the Rule shall be observed. The Court requires 15 copies of the petition; however, a pro se party who is indigent may file the original only.

Bill of Costs (FRAP 39)

Filing Time

A party to whom costs are allowed, who desires taxation of costs, shall file a bill of costs within 14 days after judgment.

Mandate (FRAP 41)

Issuance Time

The mandate is issued 21 days after judgment. A timely petition for rehearing will

stay the issuance. If the petition is denied, the mandate will issue 7 days later. If a stay of mandate is sought, only the original of a motion need be filed

WILLIAM K. SLATE, II
CLERK

OPINION IN ARNOLD v. EASTERN AIRLINES, INC., 712 F.2D 899 (4TH CIR. 1983)

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

NO. 80-1245

Richard Arnold, IV,
Appellee,

v.

Eastern Air Lines, Inc.,
Appellant,

v.

United States of America,
Appellee.

NO. 80-1246

Francis C. Mihalek,
Appellee,

v.

Eastern Air Lines, Inc.,
Appellant,

v.

United States of America,
Appellee.

NO. 80-1247

Helen Rae Weston, as Executrix of the Estate of Lewis M. Weston, deceased,
Appellee,

v.

Eastern Air Lines, Inc.,
Appellant.

NO. 80-1334

The Aetna Casualty and Surety Company; Aetna Insurance Company; American Empire Insurance Company; Commercial Union Insurance Company; Compagnies D'Assurances Du Groupe; Concorde; Continental Casualty Company; Employers Mutual Liability Insurance Company of Wisconsin; Hartford Fire Insurance Company; Industrial Indemnity Company; Maryland Casualty Company; Reliance Insurance Company; Royal Indemnity Company; St. Paul Fire and Marine Insurance Company; Security Insurance Company of Hartford; The Travelers Indemnity Company; Underwriters at Lloyd's and Associated British Insurance Companies; United States Fidelity and Guaranty Company; United States Fire Insurance Company; Zurich Insurance Company,

Appellants,

v.

United States of America; Bernard C. Groseclose; Alden E. Hare; William L. Hogan; Dennis L. Hunter,

Appellees.

Appeal from the United States District Court for the Western District of North Carolina, at Charlotte. James B. McMillan, District Judge.

Argued February 8, 1983 Decided July 8, 1983

Before WINTER, Chief Judge, RUSSELL, WIDENER, HALL, PHILLIPS, MURNAGHAN, SPROUSE, CHAPMAN, Circuit Judges, and BRYAN, Senior Circuit Judge, sitting en banc.

H. Grady Barnhill, Jr. (William C. Raper, Womble, Carlyle, Sandridge & Rice; Richard M. Sharp, Frederick C. Schafrick, Christopher J. Wright, Shea & Gardner on brief) for Appellant; Bruce N. Bagni, Torts Branch, Civil Division, Dept. of Justice (J. Paul McGrath, Assistant Attorney General; Harold M. Edwards, United States Attorney on brief) and Gary S. Hemric (William K. Diehl, Jr., James, McElroy & Diehl, P.A.; Robert R. Smiley, III, Smiley, Murphy, Olson & Gilman on brief) for Appellees.

PER CURIAM:

By way of summary the Court states its conclusions on the issues considered at the en banc hearing which took place on February 8, 1983:

1. The vote of five members for, four against, and one member disqualified, and hence not voting, which had previously taken place, constituted a determination by a majority of the circuit judges who

are in regular active service ordering rehearing en banc.

On that issue, the vote was six (Chief Judge Winter, Judge Russell, Judge Hall, Judge Murnaghan, Judge Sprouse, and Judge Chapman) for and two (Judge Widener and Judge Phillips) against.

2. The judgments of the district court in the Arnold and Mihalek[1] personal injury actions against Eastern are reversed and remanded for retrial on the issue of the proper amounts of compensatory damages.

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1 The petition for rehearing with suggestion for rehearing en banc of Eastern Air Lines granted by us was restricted to those two cases. The Weston personal injury action had, by unanimous action of the three-judge panel, for distinct reasons peculiar to that case, been reversed and remanded for a new trial as to the proper amount of compensatory damages. No petition for rehearing has been sought, or granted, with respect to the Weston case.

On that issue, the vote was five (Chief Judge Winter, Judge Russell, Judge Widener, Judge Murnaghan and Judge Chapman for and four (Judge Hall, Judge Phillips, Judge Sprouse and Judge Bryan) against.

It should be noted that Judge Ervin was disqualified and therefore did not participate in any of the proceedings in the case. Furthermore, Judge Bryan, as a Senior Circuit Judge who sat as a member of the three-judge panel, took part in the consideration as to issue 2. pursuant to 28 U.S.C. § 46(c). Judge Bryan, there being no statutory authorization for him to do so, did not take part in the consideration as to issue 1.

The several opinions of Judges Widener, Hall, Phillips and Murnaghan which follow

are devoted to the various rationales which prompted the votes of the several members of the Court.

MURNAGHAN, Circuit Judge:

In the United States District Court for the Western District of North Carolina, there were consolidated for trial several actions arising as a consequence of an Eastern Air Lines airplane crash at Charlotte, North Carolina on September 11, 1974:

1) Three personal injury actions against Eastern.

2) An Action for indemnification or contribution by insurance carriers of Eastern against the United States and four air traffic controllers.

3) Third Party claims against the United States for contribution filed by Eastern

in two of the accident cases.

The panel of the Fourth Circuit which heard the appeal affirmed judgments on behalf of the plaintiffs in two of the accident cases, reversed and remanded the third for a new trial on the issue of compensatory damages and affirmed judgments in favor of the United States and the air traffic controllers. Arnold v. Eastern Airlines, Inc., 681 F.2d 186 (4th Cir. 1982). There was a dissent at the panel level limited to the affirmance of awards for plaintiffs in the two accident cases. Id. at 206.

The case is now before the Court as a consequence of Eastern's request for rehearing en banc, contesting the judgments for the two accident case plaintiffs.

As a matter preliminary to consideration of the issues on the merits, we have to decide whether the case has in fact achieved the status of one entitled to en banc rehearing. The Federal Rules of Appellate Procedure in Rule 35 provide that a "majority of the circuit judges who are in regular active service may order that an appeal . . . be . . . reheard by the court of appeals in banc."

At the time of voting on the suggestion for en banc rehearing there were ten individuals occupying positions with the court satisfying description as circuit judges in regular active service. When the poll was taken, one court member, Judge Ervin, recused himself, did not vote, and has since that time remained disqualified.

Of the nine remaining circuit judges in regular active service five (Chief Judge Winter, Judge Russell, Judge Widener, Judge Murnaghan and Judge Chapman) voted in favor of rehearing en banc; four circuit judges in regular active service (Judge Butzner, Judge Hall, Judge Phillips and Judge Sprouse) voted to deny rehearing en banc.

The court tentatively determined that the case had achieved en banc rehearing status, and now, following consideration of arguments from counsel, confirms that tentative determination. Joining the author of this opinion in that conclusion are Chief Judge Winter, Judge Russell, Judge Hall, Judge Sprouse and Judge Chapman. Judge Widener and Judge Phillips are of the contrary view and would hold that the

vote on the suggestion of an en banc rehearing failed for want of a majority of the circuit judges in regular active service. Five, Judge Widener and Judge Phillips contend, do not constitute a majority of ten.[1]

At the outset, it should be observed that the majority's decision has been taken for the purposes of the present case. It is, of course, entitled to the precedential

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1. In light of the decision we have reached, it is unnecessary to decide, and we purposedly have avoided deciding, whether the taking of senior status by Judge Butzner on November 1, 1982, after the voting on whether to rehear the case en banc had been completed, but before an order was promulgated recording the vote, changed the equation so that the vote was, whatever view was taken, five of at most nine, and hence, in all events, a majority. Cf. United States v. Martorano, 620 F.2d 912, 920 (1st Cir. 1980); United States v. American-Foreign Steamship Corp., 363 U.S. 685 (1960); Burns v. Estelle, 626 F.2d 396, 397 (5th Cir. 1980).

weight attaching to any decision of the court. However, in Shenker v. Baltimore & Ohio R. Co., 374 U.S. 1, 4-5 (1963), there appears a suggestion that the area may well be one in which achieving fulfillment of our administrative responsibilities would allow us by rule to select, as a quorum for purposes of ascertaining a majority, when votes on suggestions for hearings or rehearings en banc are taken, either (a) all judges in regular active service, including those disqualified for the purposes of the particular case or (b) all judges otherwise in regular active service who are not, for the purposes of the particular case, disqualified from participating in any way.[2] Accordingly, we do not, by our

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2. In Shenker, it was said that the denial of rehearing en banc fell within the dis- (cont'd)

decision today preclude a possible change in practice, brought about by adoption of a rule of general applicability. Nor, of course, do we have occasion to determine whether applicable statutory language would permit or forbid such a change in practice. The uncertainties are not minimized by the Supreme Court's observation in Western Pacific Rr. Corp. v. Western Pacific Rr. Co., 345 U.S. 247, 260 (1953):

> The en banc power . . . is . . . a necessary and useful power--indeed too useful that we should ever permit a court to ignore the possibilities of its use in cases where its use might be appropriate.

(cont'd)
cretion of the Third Circuit "to devise its own administrative machinery to provide the means whereby a majority may order such a rehearing." Western Pacific Rr. Corp. v. Western Pacific Rr. Co., 345 U.S. 247, 250 (1953).

We now have no general rule, and must decide without the benefit of such a generally promulgated guide to practice,[3] the proper result in the case sub judice.

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3. The other circuits have not been uniform in their decisions. The Eighth Circuit has clearly gone one way, providing in its Local Rule 16(a) as follows:

> How Ordered; Panel for Hearing or Rehearing. A majority of the judges of this court in regular active service who are actively participating in the affairs of the court and who are not disqualified in the particular case or controversy may order a hearing or rehearing en banc upon request by a party or judge of this court in regular active service. The panel for the hearing or rehearing consists of the judges of this court in regular active service who are actively participating in the affairs of the court at the time of the hearing or rehearing and who are not disqualified in the particular case or controversy.

Cf. Ford Motor Co. v. FTC, 673 F.2d 1008, 1012 n.1 (9th Cir. 1982). Other circuits, without being so unequivocally explicit,

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have adopted and construed rules requiring that disqualified judges be counted for purposes of a quorum when the question is whether or not to hear or rehear a case en banc. For example, the Third Circuit has, by its Rule 2(3) essentially picked up the language of the applicable statute, 28 U.S.C. §46. We are informed that the interpretation in the Third Circuit has uniformly been to require, to set a case for an en banc hearing or rehearing, a majority of all judges in regular active service, even those altogether disqualified in the case concerned. Respecting the Third Circuit we note that Shenker was a case from that Circuit where rehearing was held to have failed, when two judges abstained and counting them as voting against rehearing resulted in a 4-4 split. The Supreme Court regarded the abstainers as voluntary non-voters, however, and that distinguishes the facts in Shenker from those of a case dealing with a disqualified judge who is under a binding compulsion not to vote.

The Sixth Circuit by order in a specific case which made clear that it was dealing with the question in the circumstances of a disqualified judge, Clark v. American Broadcasting Co., Inc., No. 80-1476 (6th Cir., Oct. 22, 1982), and the D.C. Circuit and the Seventh Circuit, in Copper and Brass Fabricators Council, Inc. v. Department

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We find the answer primarily in the language of the applicable statute. 28 U.S.C. §46(c):

> Cases and controversies shall be heard and determined by a court or panel of not more than three judges, unless a hearing or rehearing before the court in banc is ordered by a majority of the circuit judges of the circuit who are in regular active service. A court in banc shall consist of all circuit judges in regular active service.[4] . . .

(Cont'd)
of Treasury, No. 81-2091 (D.C. Cir. 1982) and Porter County Chapter of Isaac Walton League v. Atomic Energy Comm., 515 F.2d 513, 533 (7th Cir. 1978), have also required for a majority more than one-half of all the judges in regular active service, including those "disqualified" (6th Cir.), "not participating" (D.C. Cir.) or "taking no part" (7th Cir.).

4. The balance of §46(c) deals with a problem peculiar to the Fifth and Eleventh Circuits and further provides for participation in the decision of a case reheard en banc on the merits by a senior circuit judge who sat on the panel once a vote on a sug-

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Concentrating on the second sentence of §46(c), we perceive insoluble difficulties in any other reading of the statute, at least in its present posture, without any contrary indication from a rule or regulation, than that there shall be excluded, for quorum ascertainment purposes, any disqualified judge when a vote on a suggestion for hearing or rehearing en banc takes place. Judge Ervin has not sat when the case was reheard en banc. No responsible suggestion could be made that he, who was disqualified and consequently took no part whatever in

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gestion for rehearing en banc participated in solely by circuit judges in regular active service has conferred en banc rehearing status. It is in light of that statutory provision that Judge Bryan has participated in the en banc rehearing in the present case, but not in the determination whether the case should have an en banc rehearing.

the en banc rehearing, the decision of which is here reported, acted otherwise than properly. 28 U.S.C. § 455 ("Any . . . judge . . . shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned."). Patently a judge who is disqualifed from acting must not be able to affect the determination of any cause from which he is barred.[5]

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5. Cf. the language of 28 U.S.C. § 46(b):

> In each circuit the court may authorize the hearing and determination of cases and controversies by separate divisions, each consisting of three judges, at least a majority of whom shall be judges of that court, unless such judges cannot sit because recused or disqualified, ...

The recent amendment by the Federal Courts Improvement Act of 1982 added the language evidencing Congressional understanding that a recused or disqualified judge cannot sit. That approach finds collateral support also in 28 U.S.C. § 47 which forbids a trial judge to hear or determine an appeal from a decision reached by him.

The court en banc, therefore, could not have had among its members Judge Ervin. He, in recusing himself, has not infringed the statutory mandate that all circuit judges in regular active service shall comprise an en banc court. Any seeming contradiction between court action and statutory language is at most apparent; it is not real. There is a ready explanation. Judge Ervin is regular and active,[6] and as a general proposition is in service. However, should he, or any other regular, active member of the court, recuse or disqualify himself at any time, he is out of service insofar as that particular case is concerned. To disqualify means to debar legally. See

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6. i.e., not senior or retired. United States v. American Foreign Steamship Co., 363 U.S. 685, 688 (1960); Moody v. Albermarle Paper Co., 417 U.S. 622 (1974).

Webster's New International Dictionary, 2d ed., p. 753. That is synonymous with lack of legal capacity, i.e., with inability to serve. Hence, Judge Ervin properly did not sit during the en banc rehearing, because, for the particular case, he was not one of the circuit judges in regular active service.

With that proposition established, we turn to the language describing the body, a majority of which is required to order hearing or rehearing en banc. In §46(c), in a sentence immediately preceding the one stating who shall sit in an en banc hearing or rehearing, the body is described in substantially identical terminology: "the circuit judges of the circuit[7] who are in regular

7. The words "of the circuit" appear in the first sentence of §46(c), but not in FRAP 35 where the language of that first

active service." Again Judge Ervin does not meet the description because, for purposes of the present case, he is "out of service." It would obviously contradict the purpose of disqualification to treat the situation precisely as though the disqualied judge had voted "No." The canon of construction is well established that words repeated within the same statutory section have an identical meaning in the several places employed. E.g., United States v. Nunez, 573 F.2d 769, 771 (2d Cir. 1978), cert. denied, 436 U.S. 930 (1978).

We are not unmindful of authority to the contrary. Zahn v. International Paper Co.,

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(cont'd)
sentence is repeated. (The following, or second, sentence from §46(c) describing who shall sit on an en banc court is not contained in FRAP 35.)

469 F.2d 1033, 1041 (2d Cir. 1972), affirmed on other grounds, 414 U.S. 291 (1973).[8] However, the opinions in that case, both majority opinions and a dissent, concentrate on the policy considerations and do not allude to the language of the second sentence in §46(c) or to the problems of directly conflicting meanings assigned to the same language, appearing cheek by jowl in adjacent sentences in a single statute. It is perhaps possible that members of the Second Circuit concentrated their attention, reasonably enough, on FRAP 35(a). That rule, headed "When Hearing or Rehearing In Banc Will be Ordered," restricts itself, so far as present purposes are concerned, to a setting forth in haec

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8. Zahn was applied in Boyd v. LeFrak Organization, 517 F.2d 918 (2d Cir. 1975).

verba of the language of the first sentence of §46(c). Consequently, the conflict between the conclusion reached in Zahn and the language of the second sentence of §46(c) was not so readily apparent.

The result later reached in Zahn had been described as the correct one in En Banc Hearings in the Federal Courts of Appeals: Accommodating Institutional Responsibilities, 40 N.Y.U.L. Rev. 563 (Part I), 726 (Part II) (1965):

> Section 46(c) vests the power to provide for en banc proceedings exclusively in the active circuit judge of the circuit. Even if an active judge is disqualified from participation in an en banc decision, he still should be able to vote on the question of whether to hear the case en banc. A vote to sit en banc involves considerations of effective judicial administration and does not constitute a vote on the litigant's claim. Also, allowing the disqualified judge to vote on the en banc question has the further advantage of allowing the full membership to

> to determine more accurately the likelihood of subsequent disagreement with the panel decision.

Id. at 736.

However, the logic is badly frayed inasmuch as it is assumed that a recused judge would vote on whether a case should be heard or reheard en banc even though disqualified from voting on the merits.[9] The Fourth Circuit has simply not operated in that fashion,[10] and we do not perceive how a disqualified judge could do so without infringing

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9. To accept as persuasive the opinion in the New York University law review article would inferentially criticize Judge Ervin for not voting on the suggestion of a poll on rehearing en banc, and indeed criticize ourselves for agreeing that he should, since disqualified, not vote.

10. Chief Judge Friendly of the Second Circuit, the disqualified judge in Zahn, did not vote on whether there should be a rehearing en banc.

the rule that he should take no action which would possibly affect the outcome of a case. To count as a vote his non-vote might well be decisive as to whether the case would be reheard.

Better reasoned, we find, are to law review notes favoring a result contrary to that reached in Zahn: Comment, Federal Jurisdiction and Practice, 47 St. John's L. Rev. 339, 348 (1972) ("Upon disqualification, the Chief Judge should have properly been accorded no weight; his vote should have been neutralized by reducing the count of the regular active bench to seven and, thus, the four judges who voted for en banc reconsideration of Zahn should have carried the day."); Comment, In Banc Procedures in the United States Courts of Appeals, 43

Fordham L. Rev. 401, 420 (1974).[11]

Since a disqualified judge under §46(b) is explicitly recognized as unable to sit on a

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11. The Judicial Conference of the United States in 1973 took action on the subject which we regard as inconclusive. On the one hand, it expressed a clear preference for the reading of §46(c) which we have concluded is correct. On the other hand, it indicated that a statute might be required. The report of the 1973 proceedings provided:

> EN BANC HEARINGS
>
> The Conference approved a proposal for legislation to amend Section 46(c) of Title 28, United States Code, and authorized the transmittal thereof to the Congress. The amendment would make clear that a majority of the judges in regular active service who are entitled to vote should be sufficient to en banc a case. Under the present statute, there must be a vote of a majority of the circuit judges in regular active service which has been construed to mean that if there is a vacancy a majority of the judges actually on the court will suffice but if a judge disqualified himself there must still be a majority of the entire membership voting for an en banc sitting.

three member panel and since a disqualified judge manifestly, for the reasons heretofore given, cannot sit on an en banc hearing or rehearing, it would ascribe to Congress a petulant inconsistency, devoid of any apparent explanation, were we to hold that a judge, though disqualified, should be treated as though he were part of the quorum for the purposes of the vote on whether to hear or rehear the case en banc. The inconsistency aspect would also apply should we turn to general customary practice. See H. Robert, Robert's Rules of Order 339 (Section 43) (S. Robert ed. 1970):

> Majority Vote-the Basic Requirement
>
> [T]he basic requirement for approval of an action or choice by a deliberative assembly, except where a rule provides otherwise, is a majority

> vote. The word majority means "more than half"; and when the term majority vote is used without qualification-as in the case of the basic requirement-it means more than half of the votes cast by persons legally entitled to vote, excluding blanks or abstentions, at a regular or properly called meeting as which a quorum is present.

(Emphasis supplied.)

Accordingly, we have proceeded to rehear the case en banc. As a consequence, five court members (Chief Judge Winter, Judge Russell, Judge Widener, Judge Murnaghan and Judge Chapman) have concluded that there were errors mandating reversal for new trials as to the correct amount of compensatory damages of the judgment below in the Arnold and Mihalek accident cases.[12] Judges Hall,

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12. Eastern Airlines does not contest liability, restricting controversy to the amount of compensatory damages.

Phillips, Sprouse and Bryan, dissenting, would affirm. Undisturbed since no en banc rehearing was sought, or because we did not regard them as meriting en banc reconsideration, however, were the aspects of the consolidated case as to which the panel opinion was unanimous: (a) the award of a new trial as to compensatory damages in the Weston accident case and (b) affirmance of the judgments entered in favor of the United States and the air traffic controllers on the claims for indemnification or contribution.

The rationale for the majority decision en banc is largely to be found in the panel dissenting opinion. See Arnold v. Eastern Air Lines, Inc., 681 F.2d 186, 206 (4th Cir. 1982). It would serve no purpose to repeat. However, it must be added that, although

the panel dissent restricted itself to a description of perceived reversible error solely on the basis of improper conduct of counsel for the plaintiffs and the United States, we en banc, see substantial error in the joinder for trial or refusal to sever of the accident cases on the one hand and the indemnification or contribution actions on behalf of Aetna and other insurers of Eastern.

Of course, our judicial system could hardly function if appellate courts liberally indulged in second guessing of trial judges. The trial judges are on the scene, and properly are allowed extensive discretion in deciding such questions as whether the disclosure that a defendant is insured, while normally a grounds precluding consolidation or man-

dating severance, may be overborne by other considerations such as those relied on by the panel majority.[13] Nevertheless a trial must remain fair to both parties, and such considerations of convenience may not prevail where the inevitable consequence to another party is harmful and serious prejudice. Molever v. Levenson, 539 F.2d 996, 1003 (4th Cir. 1976), cert. denied, 429 U.S. 1024 (1976). Consolidation, or refusal to sever, where prejudice results

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13. In this case "the risk of inconsistent adjudications of common factual and legal issues, the burden on parties, witnesses and available judicial resources posed by multiple lawsuits, the length of time required to conclude multiple suits as against a single one, and the relative expense to all concerned of the single-trial, multiple-trial alternatives." 681 F.2d at 193.

under the facts and circumstances of the particular case, amounts to abuse of discretion, constituting reversible error. Dupont v. Southern Pacific Co., 366 F.2d 193, 196 (5th Cir. 1966), cert. denied, 386 U.S. 958 (1967).

There is no need for us to announce a rule of universal applicability, imposing as an absolute necessity the separate trial of every case which is a candidate for consolidation if consolidation results in revelation to the jury of insurance coverage for a defendant.[14] Nevertheless, looking at the

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14. See, however, Langley v. Turner's Express, Inc., 375 F.2d 296, 297 (4th Cir. 1967) ("... [W]e are in accord with Virginia law, which has consistently held that evidence as to insurance coverage is inadmissible and prejudicial to a defendant and the admission of such testimony or argument of counsel disclosing insurance coverage is reversible error.")

facts and circumstances of the particular case, we are satisfied that knowledge of Eastern's insurance coverage, and awareness of the approximate quantum of recovery for virtually every other crash victim, implanted in the minds of the jury resulted in prejudice, almost surely prejudice from the outset and certainly prejudice after the trial had wended its way to conclusion.

Had the cases not been consolidated, or after consolidation for discovery had they been severed for trial, there would have been no opportunity for counsel for one of the crash victims to make his uncouth observation about: "the 19 insurance companies that have been busy buying off the claims of the people." 681 F.2d at 211.

Looking alone at the size of the verdicts for compensatory damages in the three ac-

cident cases: Arnold ($3,027,500), Mihalek ($1,137,500) and Weston ($847,000), they cause the average for 70 other victims, $314,000, to pale by comparison. While peculiar characteristics of the three cases might afford an explanation, the other possibility simply cannot be eliminated that the jury, freed from any restraining concerns that it should not irresponsibly overstate damages and possibly unduly interfere with Eastern's capability to continue to do business, contemplated the pockets -- so deep as to seem virtually bottomless -- of large insurance companies (several of whom, it was emphasized, were "foreign") as a capacious source for benefactions rather than as only a spring supplying just compensation for injuries actually suffered.

In my panel dissent, I was "ready to as-

sume, for the purposes of this case that, despite difficulties which customarily would dictate separate trials, consolidation of all the cases was, nevertheless, at least theoretically proper, in view of the great dislocations that otherwise were in store for the Western District of North Carolina." 681 F.2d at 207. However, since consolidation "necessarily meant a disclosure to the jury that Eastern Airlines was insured, and that insurance carriers, rather than Eastern Airlines itself, would bear all or a substantial portion of any award to Arnold, Mihalek or Weston" (681 F.2d at 207), I emphasized that consequently there was "a heightened need to insist on scrupulous fairness in all other aspects of the trial of the consolidated cases." 681 F.2d at 208. In the actual proof of the pudding, it has now become clear to

me that the fairness required was not possible to attain. So I am entirely content to join with my four colleagues in a determination that the consolidation also amounted to reversible error.

That then presents the question of whether Aetna and the other insurers as parties to cases also held to have been improperly consolidated logically are likewise entitled to reversal and remand for a new trial. We are satisfied that the answer to be given is in the negative, for the consolidation prejudiced Eastern, but not the insurers. The fact of insurance had to be disclosed in the insurers' cases, and the fact of indemnification of Eastern by its insurers would not prejudice the insurance companies.

REVERSED AND REMANDED
FOR FURTHER PROCEEDINGS
IN CONFORMITY WITH THE
VIEWS HEREIN EXPRESSED.

WIDENER, Circuit Judge, concurring and dissenting:

I

At the outset I should say that I am able to concur in the result of this case only because it was heard in two separate and distinct parts, and amounts to two cases heard by en banc courts of different composition. The procedural aspect of the case with respect to en banc determinatnion was heard by the judges not disqualified in regular active service, while the case on the merits of the appeal was heard by them and, in addition, Judge Bryan, a Senior Judge. Had that part of the case with respect to en banc determination been determined the way I think it should have been, then we would not have reached the merits for en banc determination would have been denied

for failure of a majority.

As to the matters in the opinion of the majority with respect to en banc determination, I respectfully dissent for reasons which I will set forth below.

The fact that I concur in the grant of a new trial to Eastern does not mean that I associate myself with all of the opinion of the majority.

I concur in that part of the opinion of the majority reversing for a new trial on account of consolidation of the cases as well as the result obtained by the majority. If the subject were properly preserved, I do not disagree with the majority opinion as it adopts the reasoning of the dissenting panel opinion with respect to the conduct of the trial and especially the statements of counsel during oral argument and perhaps

elsewhere. As Judge Phillips has correctly set forth in his dissenting opinion, however, there were no sufficient contemporaneous objections made to the actions of the attorneys. Neither were there sufficient, if any, contemporaneous motions for mistrial. The absence of contemporaneous objections and motions for mistrial I think precludes consideration on appeal. It simply deprives the other side of a fair trial for an attorney to sit through an inflammatory argument which could have been and should have been stopped instantly, and, then, after the argument is over, make objection to it. At the very least, such lack of action deprives the trial court of an opportunity to see that the trial is conducted in a calm and fair manner. I can think of no other aspect which more demands the enforcement of the contemporaneous ob-

jection rule and the rule requiring motions for mistrial than does argument of counsel. Not to enforce that rule simply opens the door for turning trials into shouting matches, and I would at once close it in this en banc decision. If that were the only subject at hand, I would affirm the judgment of the district court because of lack of contemporaneous objections and motions for mistrial.

II

A.

I do not subscribe to the majority's theory that the Western Pacific Case has contributed to our uncertainty.

B.

Congress, pursuant to its constitutional power to establish inferior courts, has pro-

vided that the Court of Appeals shall hear cases "by a court or panel of not more than three judges, unless a. . . rehearing before the court in banc is ordered by a majority of the circuit judges of the circuit who are in regular active service." 28 U.S.C. §46(c). After this case was decided by a panel of three judges, the appellee, Eastern Airlines, petitioned for rehearing and suggested rehearing en banc. A poll of the ten circuit judges of this circuit in regular active service yielded five votes to grant rehearing, four votes to deny rehearing, and one disqualification. Because five votes does not constitute a majority of ten, the number of circuit judges in regular active service at the time of the poll, I respect-

fully dissent from the court's decision to rehear this case en banc.

In response to various problems concerning the proper role of retired judges in the affairs of the Courts of Appeal, Congress enacted a bill, proposed by the Judicial Conference of the United States, the purpose of which was to clarify the status of circuit and district judges who retired from regular active service. Act of Nov. 13, 1963, Pub. L. 88-176, 77 Stat. 331. S.Rep. No. 596, 87th Cong., 1st Sess., reprinted in 1963 U.S. Code Cong. and Ad. News, 1105, 1106. This legislation defined the composition of each of the various Courts of Appeal as consisting of the circuit judges of the circuit in regular active service, that is,

those judges not retired. Pub. L. 88-176, §1(a) (codified at 28 U.S.C. §43(b)). The Act then amended 28 U.S.C. §46(c) to put control of the en banc proceedings in the hands of "a majority of the circuit judges of the circuit who are in regular active service." Id. at §1(b). All the amendment did, as it affects us here, was to insert "regular" between "in" and "active" in the then existing statute.

Prior to the enactment of that amendment, the Supreme Court had discussed en banc courts in Textile Mills Corp. v. Commissioner, 314 U.S. 326 (1941), and in the Western Pacific Railroad Case, 345 U.S. 247 (1953), as well as in Shenker hereinafter mentioned. Textile Mills held that the statutes with respect

to the composition of the Courts of Appeals did not prohibit a Court of Appeals of more than three judges from hearing a case en banc, and the Western Pacific case construed the predecessor of the statute involved here as simply a grant of power to order hearings and rehearings en banc and to establish the procedure governing the exercise of that power. 345 U.S. at 267. Its holding was simply that a Court of Appeals could not restrict the initiation of the en banc procedure to the court itself, and that a decision striking out an application by a party for en banc consideration was error. In discussion the the Court did construe §46(c) as neither forbidding nor requiring each active judge of a Court of Appeals to entertain each petition

for en banc consideration, which is entirely consistent with its later ruling in Shenker.

In Shenker v. Baltimore & Ohio RR Co., 374 U.S. 1, 4-5 (1962), the Supreme Court affirmed a decision of the Third Circuit which required an affirmative vote of an absolute majority of the active members of the court and which did not require each member of the court to vote on petitions for hearing en banc. At the time Shenker filed his petition for rehearing en banc, eight judges were in active service. Four of the eight voted to rehear the case; two voted not to rehear; and two abstained for reasons that do not appear either in the Supreme Court's or the Court of Appeals' opinion. See Shenker, 303 F.2d 596, 600 (1962).

On this vote, the Third Circuit denied the petition for rehearing en banc, and the Supreme Court found no error in the denial. 374 U.S. at 4-5. The Supreme Court also found no error in the Third Circuit's procedure for polling its judges, which did not require a judge to vote on a petition. Id. at 5. The Court found such a procedure to be within the discretion of the Court of Appeals.

I do not construe Shenker to hold that a court may by rule set up the requirement of an absolute majority of the circuit judges in regular active service and then to have founded its decision upon the rule. In the first place, so far as I can ascertain, there was no rule in the Third Circuit except a near

literal copying of the words of the statute.[1] It was merely a practice of that circuit which was given effect by decision in the Shenker case. Thus, the decision of the Third Circuit was that an absolute majority was required, and this was affirmed by the Supreme Court. Both the holding of the Third Circuit and the Supreme Court are entirely consistent with the wording of the statute. Second, even discounting the two Shenker abstentions, the vote at the very best for the petitioner was four for and two against if we count the two abstentions as votes against granting the petition. It is at once apparent that

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1. Rules of the U.S. Court of Appeals for the Third Circuit, Aug. 19, 1948 with amendments to Oct. 1, 1951, Rules 4(3) and 5(3). Cf. the same Rules effective July 1, 1968, Rule 2(3), which again amounts only to a literal reading of the statute.

four to two is a majority of those judges not disqualified, and so the fact situation presented to the Supreme Court in Shenker is the same as presented to us here. Since the Shenker case offered a perfect opportunity for the Supreme Court to adopt the view the majority now does, and it did not do so, I suggest that, because the adoption of the majority view here would have changed the result of the Shenker case, the Supreme Court has rejected the position the majority now embraces.

The Second Circuit decided a similar question in Zahn v. International Paper Co., 469 F.2d 2033, 2040 (2d Cir. 1972), aff'd on other grounds, 414 U.S. 291 (1973), in a way that supports my contention that the motion for rehearing in this case failed

for want of a majority. When the petition for rehearing was considered in the Second Circuit, the court consisted of nine judges. At the time, there was one vacancy.[2] One judge did not vote because of disqualification. Of the seven judges who voted, four voted to rehear the case, and three voted not to rehear. Despite this four-to-three vote in favor of rehearing en banc, the Second Circuit denied the petition "for want of an affirmative vote 'by a majority of the circuit judges of the circuit who are in regular active service.'" Zahn, supra at 1040, quoting 28 U.S.C. §46(c). The

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2. I take it as agreed by silence among the Courts of Appeals that a vacant judgeship does not count one way or the other. The statutes speak of "judges", not judgeships.

Second Circuit has adhered to its literal reading of §46(c). E.g., Boyd v. Lefrak Organization, 517 F.2d 918 (1975) (rehearing en banc denied; four affirmative votes to rehear, three negative votes, one disqualification, one vacancy).

Besides Zahn, a majority of circuits which have confronted the problem now before us have read §469(c) as requiring an absolute majority of the circuit judges in regular active service to order a rehearing en banc. Copper and Brass Fabricators Council, Inc. v. Department of Treasury, 679 F.2d 951 (D.C. Cir. 1982), reh'g denied, unpublished order, No. 81-2091 (Aug. 3, 1982) (five votes to rehear; three votes not to rehear; two judges not participating in the matter); Clark v. American Broadcasting Co., 684 F.2d 1208, 1226 (6th Cir. 1982) (rehearing denied; five

votes in favor of rehearing, four against, and one judge disqualified); Curtiss-Wright Corp. v. General Elec. Co., 559 F.2d 1259 (3d Cir. 1979) (rehearing denied; four votes to rehear en banc, three votes not to rehear, two judges not participating); Porter County Chapter of Isaac Walton League v. Atomic Energy Comm'n, 515 F.2d 513, 533-34 (7th Cir. 1978) (rehearing denied; four votes for rehearing en banc, three votes against, one judge taking no part), rev'd on other grounds, sub nom. Northern Indiana Public Service Co. v. Porter County Chapter of Isaac Walton League, 423 U.S. 123 (1975). See also INTERNAL OPERATING PROCEDURES FOR THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT, ch. IX, B.4.b. (rev. Sept. 4, 1980) (effect of non-response to a poll

of circuit judges on decision whether to rehear a case en banc is the same as a vote not to rehear). Accord Maris, Hearing and Rehearing In Banc, 14 F.R.D. 91, 93 (1954) (the Third Circuit follows §46(c) literally; hearing or rehearing en banc is ordered only with the concurrence of an absolute majority of the circuit judges in regular active service).

A minority of the circuits that have dealt with the question have authorized en banc review upon less than an absolute majority of the circuit judges in regular active service. In the Eighth Circuit, "a majority of the judges. . .in regular active service who are actively participating in the affairs of the court and who are not disqualified in the particular case or controversy may

order a. . .rehearing en banc. . . ." RULE 16(a) OF THE U.S. COURT OF APPEALS FOR THE EIGHTH CIRCUIT (1981).

Although the Ninth Circuit apparently does not reveal the results of a poll of its members on whether to hear or rehear a case en banc, one of its members has described the circuit's policy in a footnote to a dissent from the denial of rehearing en banc. Ford Motor Co. v. Federal Trade Comm'n, 673 F.2d 1008, 1012, n. 1 (9th Cir. 1982) (Reinhardt, J., dissenting). The Ninth Circuit rehears cases en banc only when a majority of its active members who are not disqualified vote to do so.

The First Circuit, in United States v. Martorano, 620 F.2d 912 (1980), granted rehearing en banc when the vote was two for, one against, and one vacancy. Thus, that

court has joined neither the majority nor minority.

Strong practical considerations also support the plain reading of the majority requirement of §46(c), and of FED. R. APP. P. 35(a), which was adopted pursuant to the statute. "The principal utility of determinations by the courts of appeals en banc is to enable the court to maintain its integrity as an institution by making it possible for a majority of its judges always to control and thereby to secure uniformity and continuity in its decisions. . . ." United States v. American-Foreign S.S. Corp., 363 U.S. 685, 689-90 (1960) (quoting from Maris, Hearings and Rehearings in Banc, 14 F.R.D. 91, 96 (1954). In this connection, since the very direction of the court is in the

hands of itself assembled en banc, less than a majority does not hold so steady a course.

Section 46(c) allows a circuit to achieve uniformity within itself on questions of importance by acting as a full court rather than as a three-judge panel. Zahn, supra, at 1041 (Mansfield, J.). If fewer than a majority of its judges in regular active service may order en banc determination, as is now the case with us, the en banc procedure will not so surely achieve a uniform body of law, relatively immune from shifting changes in membership or disqualifications in the court. Furthermore, an important control on the invocation of the en banc process, so costly in time and resources, will be lost. Given that en banc hearing is an extraordinary measure, see F.R.A.P. 35(a), the

requirement of an absolute majority of all the judges in regular active service would help limit en banc review to those cases most meriting exceptional treatment.

In 1973, the Judicial Conference of the United States approved a proposed bill to amend §46(c) to "make clear that a majority of the judges in regular active service who are entitled to vote should be sufficient to en banc a case." 1973 Reports of the Proceedings of the Judicial Conference of the United States 47. Although by advocating such legislation it expressed its approval of the rule that this cirucit adopts today, the Judicial Conference acknowledged that Congress was the competent lawmaker in this area, and, further, that the law was to the contrary, otherwise no legislation would have been necessary. The Director of the

Administrative Office of the United States Courts transmitted a draft of the proposed legislation to both houses of the 93d Congress, which in turn referred the draft to the respective Committees on the Judiciary. 119 CONG. REC. 32,129 (House of Representatives) (Oct. 1, 1973); 119 CONG. REC. 32,153 (Senate) (Oct. 1, 1973). The draft legislation was introduced as H.R. 10805, 93d Cong., 1st Sess., 119 CONG. REC. 33,430 (Oct. 9, 1973), and was referred to the Subcommittee on Courts, Civil Liberties, and the Administration of Justice, which took no action on the bill other than to request an opinion from the Department of Justice. The bill thus died in the 93d Congress.

Since 1973, two Congresses have seen fit to amend §46(c), without addressing themselves

to the specific problem posed by the Judicial Conference's draft legislation. See The Federal Courts Improvement Act of 1982, Pub. L. 97-164, §205, 96 Stat. 25, 53 (1982); Act of Oct. 20, 1978, Pub. L. 95-486, §5, 92 Stat. 1629 (1978). If any inference is to be drawn from the subsequent legislative history of §46(c), it is that Congress, the only body competent to change the statute, was aware of the construction of the statute sought to be changed by the Judicial Conference and chose not to change it.

Despite the plain language of the statute and its literal interpretation by a great majority of the circuits, the majority insists that the en banc court comprises the judges in regular active service other than those judges who are disqualified. It would

so read the statute because to require an absolute majority would have the effect of treating a disqualification or an abstention as though it were a no vote. Mindful of a judge's duty to disqualify himself whenever his impartiality might reasonably be questioned, 28 U.S.C. §455, the majority takes the position that to treat a disqualification as a no vote would allow a judge improperly to affect the determination of the cause from which he is barred. Slip op. at 14.

I think the majority's concern is legitimate but misdirected.

The clear import of 28 U.S.C. §455 is to prohibit a judge's participation in the determination of a case within the purview of that statute. Although a disqualification may be viewed as a no vote, that effect is

entirely incidental. We must assume that a judge will recuse himself whenever required to do so, and when he is disqualified, the incidental effect is always one way, namely, to leave the absolute majority requirement in effect with one less possible vote to rehear.

But the majority's reading of the statute does not cure the mischief it assumes. Under the majority decision, five votes to rehear are needed in this case only because one judge disqualified himself. If that one judge had not disqualified himself, then six votes would have been needed to rehear the case. The result of that one judge's disqualification was to reduce the number of votes needed to rehear the case en banc from six to five. Viewed from the other side of the case, then,

that judge's disqualification had the immediate effect, albeit unintended and incidental, of a ye vote. The disqualification made en banc review easier to obtain by one vote, and according to th majority's logic, it is as though the disqualified judge voted yes and is affecting the outcome of the cause from which he is barred, thereby contravening 28 U.S.C. §455.[3] Thus, I suggest the majority's reasoning, that its construction of §46(c) avoids a conflict with §455, is patently self defeating, and reveals the correct conclusion which is that

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3. In a court with an even number of judges the first, third, fifth, etc., disqualification would affect the number of votes required. In a court with an odd number of judges, the second, fourth, sixth, etc., disqualification would affect the number of votes required. Disqualification of more than one judge is not uncommon in this circuit.

§455 has nothing to do with how this case should be decided.

I thus respectfully dissent to the grant of en banc review.

Judge Phillips authorizes me to state that he joins in part II of this opinion.

HALL, Circuit Judge, concurring:

I agree with the majority that because of his disqualification Judge Ervin should not be counted in determining whether a majority of active circuit judges voted for rehearing this case en banc. In my view, however, the issue of whether rehearing en banc was proper in this instance can be resolved on a more narrow and equally compelling ground. On November 1, 1982, Judge Butzner took senior status before the order granting rehearing en banc was entered on December 23, 1982. It is true, as the majority opinion points out, that Judge Butzner was in regular active service when he voted on the suggestion for rehearing en banc. But, in my view, the fact that he was eligible at the time he voted on the

suggestion is irrelevant. The critical time for determining a circuit judge's eligibility to have his vote counted is when the order on the poll is entered. Thus, I conclude that Judge Butzner's vote should not be counted, because when the order granting en banc rehearing was entered, he was no longer a circuit judge in regular active service.

I find support for this conclusion in the statute and rule governing en banc rehearings, as well as in the applicable case law. 28 U.S.C. §46(c) reads in pertinent part as follows:

> Cases and controversies shall be heard and determined by a court or panel of not more than three judges ... unless a hearing or rehearing before the court in banc is ordered by a majority of the circuit judges of the circuit who are

> in regular active service. (Emphasis added)

F.R. App. P. 35(a) further provides:

> Determination of Causes by the Court in Banc
>
> > (a) When Hearing or Rehearing in Banc Will be Ordered. A majority of the circuit judges who are in regular active service may order that an appeal or other proceeding be heard or reheard by the court of appeals in banc. (Emphasis added)

The critical verb in both the statute and the rule governing en banc review is "order." The power to order a rehearing en banc is clearly confined to those circuit judges who are in regular active service. Moody v. Albermarle Paper Company, 417 U.S. 622, 626 (1974); Allen v. Johnson, 391 F. 2d 527, 532 (5th Cir. 1968).

In United States v. American-Foreign Steamship Corp., 363 U.S. 685, 68-89 (1960), the Supreme Court constructed the provisions of 28 U.S.C. §46(c) and concluded that the crucial time for ascertaining a judge's eligibility to participate in an en banc decision was fixed by the statute's use of the verb "determined." Based on this construction, the Court held that a circuit judge who assumed senior status after the grant of a petition for rehearing en banc, but before the case was decided, was not eligible to participate in the decision.[1]

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1. In a similar vein is this court's decision in Mayor & City Council of Baltimore v. Matthews, 571 F.2d 1273 (4th Cir. 1978). Relying on the Supreme Court's holding in American-Foreign Steamship, we concluded in that case that the vote of Judge Craven, who had died after he had concurred in a draft opin-

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Applying this same rationale to the present issue, the validity of Judge Butzner's vote can only be determined at the time the en banc rehearing was ordered. Because Judge Butzner was not in regular active service on December 23, 1982, when the order in this case was entered, I can only conclude that his vote on the suggestion for rehearing en banc may not be counted in determining whether the required majority was attained. Thus, in my view, without even reaching the question of Judge Ervin's status, at the time the order was entered there were at most nine circuit judges in regular

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ion, but before the court's decision was announced, could not be counted in disposing of the appeals.

active service.[2] Because five voted in favor of rehearing en banc, the requisite majority was achieved and rehearing en banc was properly authorized.

In all other respects, I agree with the majority's reasoning on the en banc portion of its opinion. As for the merits, the majority opinion correctly states that I would affirm the district court. I agree with the result reached in the panel decision.

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2. The judicial vacancy created by Judge Butzner's withdrawal from active service does not count in determining whether a majority exists. See United States v. Martorano, 620 F.2d 912, 920 (1st Cir. 1980).

PHILLIPS, Circuit Judge, dissenting:

I respectfully dissent, both from the court's decision to rehear this appeal en banc,[1] and from its ensuring en banc decision on the merits.

The decision to rehear this appeal en banc was in the first place an improvident one tested by principles that should, but did not here, constrain the court's invocation of that extraordinary procedure.

The decision on the merits, displacing a panel decision which, whatever its merits, was based upon a detailed and fully articulated record review of purely discretionary

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1. This is a matter aside from the technical question whether under the controlling statute and rule rehearing en banc was compelled in this case by the vote taken on poll of the court, a question separately addressed in Judge Widener's dissenting opinion.

trial court rulings, is, by contrast, best seen as a blunt, though unadmitted, exercise of the court's supervisory jurisdiction. That appellate power is invoked here to condemn and deter by the most drastic possible means misconduct of counsel which, though concededly egregious when considered in mass and in isolation, is never demonstrated on any principled basis to have been the likely cause of any actual prejudice to the only party favored by the court's en banc decision. The predictable result of this apparently intuitive exercise of raw supervisory power is a correspondingly indiscriminate remand for a new trial that in this multifaceted case introduces a new set of injustices, wholly ignored by the court, affecting parties who have had no real oppor-

tunity to suggest them to the en banc court.

On both points more is involved here than the ultimate result in this legally unexceptional diversity case. Each decision trenches upon matters of ongoing institutional concern for which, by these decisions, unfortunate appellate review practices in this court are encouraged and regrettable legal precedent may have been established.

Because of the broader implications of the decision, expression of a dissenting viewpoint on both decisions is warranted. I take the decision to rehear en banc and the decision on the merits in that order.

I

The standards by which courts of appeals are to decide whether to rehear an appeal en banc are concededly not subject to pre-

cise formulation and wholly consistent application. The controlling rule, Fed. R. App. P. 35(a), implementing the undergirding statutory grant of power, 28 U.S.C. §46(c), tells us only that the procedure is "not favored and ordinarily will not be ordered except (1) when consideration by the full court is necessary to secure or maintain uniformity of its decisions or (2) when the proceeding involves a question of exceptional importance." There is enough flexibility built into the very text of this rule -- in the word "ordinarily" and in the open-ended expression of "exceptional importance" -- that it could not be claimed that the rule itself either compels or excludes rehearing en banc in <u>any</u> case.

But of course, we know -- as the intro-

ductory "not favored" admonition directly tells us -- that the procedure is intended by Congress and the Supreme Court to be used sparingly and with careful discrimination, and that some other standard than a purely subjective, eye-of-the-beholder perception of "exceptional importance" should constrain us in the matter. The Supreme Court, which wisely has deferred as a matter of deliberate policy to the courts of appeals' discretion in invoking this procedure, see Western Pacific Railroad Corp. v. Western Pacific Railroad, 345 U.S. 247, 269 (1953) (Frankfurter, J., concurring), has, however, adjured caution and circumspection upon us. So we have been reminded by the Court that "[e]n banc courts are the exception, not the rule"; that they should be "convened

only when extraordinary circumstances exist that call for authoritative consideration and decision by those charged with the administration and development of the law of the circuit," United States v. American-Foreign Steamship Corp., 363 U.S. 685, 689 (1960); and that the policy of the en banc rehearing statute is "'that the active circuit judges shall determine the major doctrinal trends of the future for their court,'" id. at 690 (emphasis added). See also Church of Scientology v. Foley, 640 F.2d 1335, 1338-41 (D.C. Cir. 1981) (en banc) (Robinson, C.J., dissenting).

Notwithstanding these wise admonitions suggesting the existence of objective criteria by which we should discipline ouselves in this matter, it remains the fact that we

are constrained only by that discipline. And it cannot be gainsaid that in practical terms the standard for invoking the en banc rehearing procedure remains -- to paraphrase Chief Justice Hughes on the Constitution -- whatever a sufficient majority of active circuit judges in a particular case considers it to be. For this reason, it is not possible to insist that there are any cases which are improper "as a matter of law" for en banc rehearing, and of course I make no such claim for this or any case. See United States v. Lynch, 690 F.2d 213, 215 n.22 (D.C. Cir. 1982) (Robinson, C.J.).

It is possible, however, to insist that there is a discernible scale of case-types in terms of probable fitness for en banc rehearing. We need periodically -- if for no

reason than possibly to stem the tide of almost routine suggestions these days for rehearing en banc[2] -- to consider that scale as an aid to principled and sparing invocation of the procedure. This case provides a particularly appropriate occasion for the exercise because it involves the most flagrant disregard of the principles of restraint that the scale teaches.

Without attempting to define in detail the categories of cases most fit for en banc rehearing,[3] it is certain that lowest in the

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2. Cf., Western Pac. R.R., 324 U.S. at 270 (Frankfurter, J., concurring) (noting in 1952 "a growth in the tendency to file petitions for rehearing in the courts of appeals").

3. The rule itself specifically identifies only the most obvious type, that wherein the panel decision conflicts with another, thereby threatening the "uniformity of [the circuit's] decisions." Fed. R. App. P. 35(a)(1). Certainly also high in any reckoning of "special importance" must be cases presenting dif-

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order is that general category wherein the suggestion is only of non-constitutional error leading to an arguably unjust or incorrect panel decision having no significant precedential implications. As to such cases, former Chief Judge Kaufman has expressed the general view that a "judge should [not] cast a vote for reconsideration by the entire court merely because he disagrees with the result reached by the panel ... Rule 35 was not adopted to provide that luxury." Gilliard v. Oswald, 557 F.2d 359, 359 (2d Cir. 1977). This bespeaks a general perception, with which I certainly agree, that it is not the intended function of the en banc proce-

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ficult or novel constitutional issues having potentially wide application. Beyond these, "special importance" becomes less manifest. See generally, Church of Scientology, 640 F.2d at 1341-42 (Robinson, C.J., dissenting).

dure simply to provide in effect another intermediate appellate court to review for "mere" panel error. See Western Pacific Railroad, 345 U.S. at 275 (Jackson, J., dissenting) (use of procedure for this purpose likened to "appeal from the three-judge court to a swollen circuit court"); Church of Scientology, 640 F.2d at 1341 (Robinson, C.J., dissenting); United States v. Robinson, 560 F.2d 507, 526 (2d Cir. 1977) (Feinberg, J., dissenting). This case is obviously in that general category.

Within this general low-fitness category of mere error-correction cases, there is concededly the potential in any case that the decision suggested for en banc reconsideration not only involves prejudicial panel error, but affects "doctrinal trends" or

involves matters of significant public interest as well, so that "exceptional importance" justifying en banc rehearing on the latter basis is present. Even within this cateogry of "correction-plus" cases, however, further gradations of potential "importance" can be identified and should be kept in mind.

At the highest level of potential importance in the general low-fitness category must be cases involving misapprehensions or misapplications of signficant legal principle, even of non-constitutional dimensions. These principles may in some cases be of such precedential moment that en banc rehearing is justified, not "merely" to correct an arguably erroneous panel result, but to bring to bear the full court's consideration of a major doctrinal problem having serious pre-

cedential implications for circuit, and possibly national, law. See, e.g., Adams v. Proctor & Gamble Manufacturing Co., 697 F.2d 582 (4th Cir. 1983) (en banc) (effect on individual Title VII claims of consent judgment in EEOC action). See generally, Walters v. Moore-McCormack Lines, 312 F.2d 893, 894 (2d Cir. 1963) (en banc) (Lumbard, C.J.).

Certainly at a distinct level below such "important legal precedent" cases are those wherein the dispositive issues are purely factual or discretionary ones and it is suggested only that the panel incorrectly upheld or rejected trial court fact findings or found or failed to find abuse of trial court discretion. In neither type case is a legal issue with significant precedential implications likely to be involved.

In fact-dispositive cases, even if the controlling legal principles are of the greatest significance, rehearing en banc simply to consider a suggestion of panel error in its review of trial court findings of predicate facts is not warranted under the procedure.[4] See, e.g., United States v. Collins, 462 F.2d 792, 802 (2d Cir. 1972) (en banc) (rehearing en banc improvidently granted where appeal turns solely upon validity of trial court factual determinations that controlled app-

4. It is of course possible that in a "fact-review" case the real question is not simply one of panel judgment in applying the agreed standard for fact-finding review, but is of the proper standard to be applied. This is itself a matter of legal principle, and a court might properly consider it necessary to address that significant legal principle en banc. Such an issue was, for example, recently the dispositive one in Pullman-Standard v. Swint, 102 S. Ct. 1781 (1982) (appropriate standard for review of ultimate finding of employer motivation under Title VII).

lication of unchallenged Miranda principle).

At an even lower level -- indeed by any reckoning at the very lowest level of potential importance -- are those cases, such as the instant one, wherein the suggestion is only of panel error in affirming trial court discretionary rulings.[5] Here the en banc

5. Cases wherein panel decisions have affirmed trial court discretion are generally even less appropriate for en banc rehearing than are those in which panel decisions have found abuse of discretion. The latter are at least likely to have established "as a matter of law" a per se limit on trial court discretion that could have important precedential effects. Affirmances, however, will typically avoid defining the specific limits, holding merely that the challenged action lies within undefined, permissible bounds, and will therefore have no effect beyond the immediate case. Additionally there is the fact that en banc reconsideration of panel affirmances threatens the joint view of two "lower" judicial levels rather than one of two opposing views. Cf., generally, 11 C. Wright & A. Miller, Federal Practice and Procedure §2819 (1973) (pointing up greater appellate deference owed trial judge discretionary denials than grants of new trials for claimed jury error in assessing evidence).

court will simply be second-guessing a panel's judgment call that was itself required to be greatly deferential to that first made at the trial court level. Such cases are not likely ever to provide a fit occasion for invoking the en banc procedure, no matter how egregiously "wrong" the panel's judgment call affirming trial court discretion may appear even to a sizeable majority of the full court. No legal principle will emerge in clarified, altered, or corrected form from such an en banc decision.[6] No general precedent of ongoing value in the exercises of trial court discretion or of appellate review of such exercises is likely to result, given the inevitably high fact-specificity of the trial

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6. Unless, perchance, the appropriate standard of review of the ruling -- a legal principle -- is itself drawn in issue, See United States v. Robinson, 560 F.2d at 518-19 (Oakes, J., dissenting).

court rulings.[7] The only possible justification for rehearing such appeals en banc will be that found in the narrow, one-time-only "correction" of an "incorrect" or "unjust" panel decision affirming a trial court's discretionary conduct of a particular trial whose exact dimensions will never be repeated.

Even if the possibility of justification in some discretion-review cases be admitted, the value of mere one-case "correction" in a particular case must always be weighed carefully in the balance against weighty conflicting considerations that underlie the basic admonition that the procedure is "not favored." Those conflicting considerations

7. Unless, perchance, a narrow per se rule of abuse of discretion has been applied by the panel and is challenged in the suggestion for rehearing en banc. But see supra note 5.

are the obvious and simple ones identified by Justice Jackson in the course of pointing out why all rehearings en banc for merely one-case corrective purposes are disfavored:

> [They] are not appropriate where the effect is simply to interpose another review by an enlarged Court of Appeals between decision by a conventional three-judge court and petition to [the Supreme] Court. Delay, cost, and uncertainty, which successful and the unsuccessful, the just and unjust litigant, are each increased by an additional appeal to a hybrid intermediate court.

Western Pacific Railroad, 345 U.S. at 273 (Jackson, J., dissenting); see also, Church of Scientology, 640 F.2d at 1341 (Robinson, C.J., dissenting) ("drains judicial resources [and] leads to multiplicity of opinions [resulting in] inability to offer auth-

oritative guidance").

With these considerations in mind, the en banc decision in this case confirms every point that makes rehearing en banc in this type case, of all types, most inappropriate. Laying aside the question whether the decision may have "corrected" a sufficiently grave panel error to justify on that basis alone invoking the generally disfavored procedure -- a matter addressed in Part II -- the decision predictably serves none of the dominant institutional purposes of the procedure.

It obviously resolves no intra-circuit conflict of decisions. It neither announces, abandons, nor clarifies any legal principle that might bear upon general "doctrinal trends" in circuit law. It lays down no

precedent likely to provide helpful guidance either to the district courts in exercising discretion or to this court in reviewing exercises of discretion in future cases of general comparability. It deals with no controversy of such general public importance, as opposed to public curiosity, that full-court imprimatur is desirable simply to encourage greater public confidence in the end result. It simply substitutes the judgment of a one-vote majority of the nine-member en banc court for that of a one-vote majority of a three-member panel on purely judgmental questions of trial court discretion not likely ever to recur in even generally comparable form. Raw power obviously exists in the larger majority to do this; the real question is the propriety of the power's exer-

cise in this or other cases of the general type.

If one looks to the opinion itself -- principally to the panel dissent which, it is said, contains the basic rationale for the en banc decision -- it is obvious that the "exceptional importance" of the case was thought to lie only in the special venality of counsel's misconduct, the special degree of dereliction in the trial judge's failure to curb or correct it, and the special degree of panel error in failing to set things right at the appellate level. It could be asserted, I suppose, that on the root matter -- counsel misconduct -- the decision does embody a sufficiently important general principle and set a sufficiently important and helpful precedent. The principle, presuma-

bly: that counsel misconduct sufficiently egregious will taint and require setting aside a verdict; the precedent: that repetitions of this particular degree will in this circuit have that result, even if it takes en banc rehearing to achieve it.[8]

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8. Achieving the narrow precedential effect of deterring comparable counsel misconduct by failing to reward that here is in fact given as a specific justification for the en banc decision. In the incorporated panel dissent it is suggested that the "[panel] majority's opinion [is] an open invitation to outrageous misbehavior by trial lawyers."

As a colorful means of giving weight to a strongly felt dissenting opinion, this dire prediction is an unexceptionable exercise of the judicial prerogative. But of course it overstates. Countless appellate decisions declining to order new trials for clear counsel misconduct have gone on the books without causing the general ruin this suggests.

Every decision rejecting challenges to marginal ethical conduct or questionable trial tactics of counsel contains some risk of condonation, but cases have to be decided up or down. It would be quite as reasonable

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The general principle is of course unquestionable. But it has never been in doubt and convening an en banc court simply to emphasize its continued vitality is not a provident use of heavily pressed judicial resources.

Just as the legal principle is too general to justify two levels of appellate review to insure its "correct" application in a par-

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now to suggest that the en banc decision necessarily condones trial court sandbagging tactics. Certainly a signal of some sort is given that trial counsel may with impunity raise no objection on trial to opposing conduct and take their chances on a favorable verdict, secure in the knowledge that if the verdict is unfavorable this court will nevertheless entertain their belated perception of prejudice (particularly if presented by different appellate counsel), paying no attention to what is probably the clearest on-the-scene indication of the degree of prejudice actually involved. See Arnold v. Eastern Air Lines, 681 F.2d 186, 195, 200 § n.15 (4th Cir. 1982) (Arnold I), superceded, Arnold v. Eastern Air Line, __ F.2d __ (4th Cir. 1983) (en banc).

ticular case, so the only legal precedent that could result from the effort will necessarily be so narrowly fact-specific as to be positively mischievous rather than helpful (if taken at all seriously). I predict on that score that the surest consequence of this decision will be a spate of appeals, petitions for rehearing, and suggestions for rehearing en banc in which we are invited to liken or contrast in minute, fine-honed detail various examples of counsel misconduct with that in this case. The result of that, I further predict, will be that so far as its precedential effect is concerned, this decision will quickly either be regretted or disregarded -- equally unfortunate consequences for the stability and predictability of our processes.

There remains a possibility that, in all fairness, should be considered. Even conceding the general unfitness of this type case for en banc rehearing, and conceding that in a particular case no justification exists beyond one-case error correction, the injustice of a particular panel decision might be so grave and so manifest that a court armed with the power to set it right en banc could not responsibly fail to do so. I concede the point. See United States v. Lynch, 690 F.2d at 215 n.22.

Where this is to be the sole basis for rehearing en banc, however, a special discipline is compelled for making the collegial decision that grave and manifest injustice rather than merely arguable panel error is involved. Fortunately, one reliable means

of discipline is readily available. It lies in the very cast of the court's vote on the en banc rehearing question. In a case where every member of a court other than the majority of a divided panel votes to rehear en banc, the sheer vote balance suggests a collegial judgment that injustice going beyond mere error is not merely arguable but manifest, and the validity of individual perceptions to that effect as reflected in the individual votes is by the overall vote confirmed. If, on the other hand, a vote to rehear en banc in such a case is close -- particularly, as here, a bare majority -- a reconsideration of the propriety of en banc rehearing is suggested for a collegial court by the very closeness of the vote. The strong indication from such a closely di-

vided corporate judgment is that whatever of panel error is arguably involved, it does not amount to injustice so grave that its correction by the full court's consideration is both necessary to insure justice and essentially foreordained by the vote.

In such a case, and I suggest in this case, a court should yet step back. It is never too late to determine, on the basis of newly revealed aspects of a case, that an original vote to rehear en banc was improvident when considered in a new light shed by later developments. See, e.g., United States v. Collins, 462 F.2d at 802-03; see also, Church of Scientology, 640 F.2d at 1344-45 (Robinson, C.J., dissenting). This is classically such a case, and even at this stage of the proceedings, I think we should, upon recon-

sideration, deny the suggestion for rehearing en banc and let stand as the court's judgment the panel decision. See id.

Aside from insuring in the end a more principled administration of the disfavored en banc procedure in this case, this would also yield the proper result on the merits. For, as I believe will be shown in Part II, the most that could be said for the en banc decision is that it simply substitutes for any injustice in the panel decision at least equal, and arguably greater, injustices running in the opposite direction. Where this is the only consequence of an en banc rehearing of trial court discretionary rulings, it confirms the improvidence of the initial decision to rehear en banc. It also points up the wisdom of the rule that accords great

appellate deference to trial court discretion in balancing the risks of relative injustices (the very essence of discretionary judicial action) in an attempt to achieve the most just solution possible. In such situations, the questionable ability of appellate courts in general to strike and better discretionary balance cautions doubly against the expense and investment of resources involved in two-tiered efforts to do so. See generally, Wright, The Doubtful Omniscience of Appellate Courts, 41 Minn. L. Rev. 751 (1957).

This case should never have been wrung through this most dubious process to yield so dubious a substitution of pure judgment calls by so close a final call and with such new and unexplored injustices.

II

The en banc decision on the merits is, apparently, that largely because of the special risks of prejudice created by trial consolidation the misconduct of counsel took on such special color that the verdicts of all three plaintiffs against Eastern Airlines must be set aside and new trials on those claims ordered.[9] The displaced panel deci-

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9. In its written brief Eastern apparently, though imprecisely, contended both that the damage awards were excessive per se, and that counsel misconduct had improperly inflated them, whether or not they were excessive per se. The panel opinion considered and rejected both arguments. See Arnold I, 681 F.2d at 200-04. During oral argument on the rehearing en banc, Eastern's counsel confined argument to counsel misconduct as an impermissibly inflating factor, correctly pointing out in response to a question from the bench that it was not necessary to prove an award "outrageous" in amount under the test of Grunenthal v. Long Island R.R., 393 U.S 156 (1968), to show that it was improperly inflated by counsel's misconduct. This cont'd

sion rested on a contrary assessment that despite the conceded impropriety of much of the challenged conduct, a careful review of the record, undertaken with proper deference to trial court discretion, revealed that improper influence of the jury could not be assumed a probable consequence of the misconduct. Arnold v. Eastern Air Lines, 681 F.2d 186 (4th Cir. 1982) (Arnold I), superseded, Arnold v. Eastern Air Lines, __ F.2d __ (4th Cir. 1983) (en banc).

I stand on the panel majority's assessment to that effect. Not only does it reach a more defensible result but, quite as sig-

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implicit concession that excessiveness per se is not now challenged is apparently reflected as well in the en banc court's opinion which is essentially confined to identifying counsel misconduct as the sole basis for setting aside the verdicts.

nificantly for our ongoing processes, it reflects a more principled process of review for this type case than is reflected in the en banc decision by the court. Because I think the en banc decision is flawed not only in its result but, just as critically, in its apparent process of review and correction, I add some thoughts here on the latter aspect.

A.

The en banc decision is -- so far as can be discerned from what is said in the two opinions -- rested entirely upon a blunt perception that the misconduct of counsel here is so bad that review need not go beyond a simple recognition of its particular degree of impropriety -- with remand for new trial dictated as a matter of course because of the degree perceived and the need to deter repe-

titions. No attempt is made to assess whether, under a careful record review, it must further be assumed that actual prejudice to Eastern probably resulted from the misconduct.[10] I understand the court's in-

10. The en banc court's decision rejecting the conclusion drawn by the panel majority from the latter's detailed review cannot fairly be taken as, by implication, a comparable review that simply has led to a contrary conclusion. The gist of the en banc court's basis for decision is fairly found in the panel dissent, which in fact is said largely to contain the en banc decision's rationale. Arnold v. Eastern Air Lines, __ F.2d __ (4th Cir. 1983) (en banc) (No. 80-1245, slip op. at 17). The unmistakable impression from the panel dissent is that misconduct so egregious is so necessarily prejudicial that this ends the matter and makes detailed review to assess the probability of actual prejudice unnecessary.

The nearest that the en banc majority comes to identifying specifically prejudicial trial court error is in the incorporated panel dissent's conclusion that the trial judge's handling of the case caused him to "lose control of the situation." Arnold I, 681 F.2d at 211 (Murnaghan, J., dissenting).

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stinctive first-blush dismay -- even outrage -- and have expressed my own.[11] But I do

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cont'd
This conclusion is rested in turn on the stated perception that when the trial judge announced before trial an intention that there should be but "'one more trial on all the fact issues in these cases,'" this signalled to plaintiffs' counsel that under no circumstances would the judge declare a mistrial. Id. at 211 & n.3. From this it is said, counsel were encouraged to engage in outrageous behavior, and the judge, locked in by his pre-trial announcement, was made impotent to control it by the ultimate sanction. Id. at 211.

With all respect, this analysis simply will not bear record scrutiny in any of its critical elements, starting with the critical meaning ascribed to the "one trial" announcement. Of course the judge was not by this committing himself against mistrial for whatever cause; his meaning was completely different and could not have been interpreted in the critical way the panel dissent has done in retrospective assessment. The whole record in fact belies the serious indictment that -- whatever may have transpired -- this experienced trial judge ever "lost control" of the case in the way now thought by the majority to require a new trial.

11. Arnold I, 681 F.2d at 195.

not understand the court's failure -- as I read its opinion -- to ponder more deeply the real issue that follows.

Review of trial court discretion in responding to party and counsel misconduct in jury trials is undoubtedly among the most difficult appellate tasks. See Arnold I, 681 F.2d at 194-95. The temptation in review is understandably great to make instinctive judgments that particular misconduct might improperly have influenced a jury because of its obvious capability to do so. But fair review requires a further effort on a principled basis to fathom whether it did in fact probably do so in the particular case.

The reason is obvious. We do not sit as general monitors of the professional conduct of lawyers in trial courts. In the overall

scheme of things that important task is given over to others -- to the organized profession in general and, in particular trials, to the broad discretion and equally broad final responsibility of trial judges. See Rosenberg, Judicial Discretion of the Trial Court, Viewed From Above, 22 Syracuse L. Rev. 635 (1971). Not only are we not given the task of general supervision, we are not equipped to do it fairly and consistently if we undertake it. Aside from other frailties and limitations that beset us as appellate judges in assessing the subtleties of both judicial and non-judicial influences on juries, the only effective sanction we have for correcting misconduct of counsel -- ordering a new trial -- is not available at all against losing counsel (surely equal culprits over the long

haul and the run of cases), and, when invoked against prevailing counsel, is visited mainly upon their faultless clients.

That in the overall scheme it is not given to us to root out this particular evil whenever and however it comes to our attention in cases properly before us may be a matter of deep regret to different ones of us from time to time. But the temptation to range beyond our limited function of reviewing for judicial error should be resisted. The way systematically to resist it lies precisely in doing what I am satisfied was not done here: making pragmatic inquiry past the misconduct into whether improper influence upon the jury from that misconduct can be accepted as a probability, see City of Cleveland v. Peter Kiewit Sons' Co., 624 F.2d 749,

756 (6th Cir. 1980), being content to leave to other forces of correction -- or to oblivion -- any misconduct not found legally prejudicial as well as ethically opprobrious. That exhausts both our responsibility and our power to correct for legal error.

It is critical that such a tough-minded and disciplined inquiry into actual prejudice was not -- so far as we are given to understand -- considered necessary here. For, as the majority panel opinion demonstrated, such a review rather easily dispels the initial shock effect undoubtedly created, as intended, by appellate counsel's adroit massing, and heavy-handed repetition, of the various discrete instances of counsel misconduct upon which Eastern's appeal was primarily based.

Full recapitulation of the panel majority's

review on that score is not appropriate here. It suffices to refer to some of the more obvious perceptions opened by that review and apparently considered inconsequential by the en banc majority: the significance of the extended period of time over which the instances of misconduct massed in appellant's brief actually occurred, see Arnold I, 681 F.2d at 195, 200; the numerous, carefully phrased cautionary instructions given by the trial judge designed to screen the jury from improper influences flowing from improper or questionable conduct by counsel for all parties, see id. at 198-99 & nn.11-13; the fact that the dominant issue in the case was the degree, conceded to be at least "ordinary" negligence, of Eastern's culpability, see id. at 197-99

and, most critically, the failure of Eastern's counsel to have made any contemporaneous or other objection at trial to any but a very few[12] of the numerous instances of conduct carefully massed for challenge on appeal, see id. at 200.

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12. The exact number is not clear, but the total is infinitesimal in relation to the instances massed for appellate review. Most significantly, no objection was made at trial to either of the most obvious technical improprieties: the Golden Rule allusion in opening statement and the appeal for sympathy in closing argument. No motion for mistrial was made before the conclusion of jury argument. A motion for mistrial was made following jury argument, but it was confined to the effect of the "no-settlement-offer" argument, which was then made the subject of a strong curative instruction and other corrective measures. Of the numerous instances of improper jury argument relied upon by Eastern and the en banc majority, none was made the subject of contemporaneous objection by trial counsel. Perhaps significantly, however, three objections that were made by trial counsel are not specifically brought forward by appellate counsel.

Because I remain persuaded that on a fair and properly deferential review of the record no prejudicial error resulting from counsel misconduct is shown, I would affirm the Arnold and Mihalek personal injury judgments and otherwise hold with the panel decision.

B.

There remains a possibility that should be considered. It is that the en banc decision can be viewed and justified as a valid exercise of the court's supervisory jurisdiction over proceedings in the district courts even if actual prejudice were not demonstrable. As indicated at the outset of this opinion I think this is the most forthright way to view the decision. Because I dissent from the result, however it may be grounded, I address this possibility.

Though the contours of this residual appellate power are understandably vague, it is undoubtedly drawn upon by federal courts from time to time in situations where justice, or the appearance of justice, has been thought to require corrective intervention even though actual prejudice to aggrieved parties cannot be demonstrated or is concededly absent. See, e.g., Thiel v. Southern Pacific Co., 328 U.S. 217 (1946) (tort defendant's verdict set aside for misconduct of jury commission and clerk of court in excluding daily wage earners from jury lists; "unnecessary to determine" actual prejudice to plaintiff); Young & Simon, Inc. v. Merritt Savings & Loan, 672 F.2d 401 (4th Cir. 1982) (new trial because of two-week interruption, over objection of counsel, of plaintiff's presenta-

tion of complicated case; no assessment of actual prejudice). It is arguable that within this general usage of the power, a court may properly intervene to correct and deter sufficiently opprobrious misconduct by trial counsel -- officers of the court -- even though no actual prejudice stemming from the misconduct can fairly be demonstrated under ordinary standards for reviewing the trial court's discretionary handling of the misconduct. Though the en banc majority does not say that this is the basis of its decision here, it seems to me implicit in what is said in the opinions giving the court's formal rationale. See supra note 10.

Reserving the question whether the misconduct of private counsel for prevailing parties should ever be an occasion for in-

voking supervisory corrective powers -- a point on which I have grave doubt[13] -- I am satisfied that in this case the misconduct does not. For two basic reasons.

In the first place, as developed in Part I, the existence of a sufficient degree of manifest injustice to justify an exercise of this extraordinary power is simply belied by the closely divided corporate judgment of the court on the en banc rehearing question and now, on the merits. Beyond this the remedy used to correct and deter the per-

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13. Because, in the absence of a determination that actual prejudice to a party probably resulted, this casts appellate courts in a professional conduct monitoring role for which, as earlier indicated, they simply are not equipped -- either in fact-finding capability or in the limited range of sanctions available in appellate review of particular cases.

ceived injustice is itself afflicted with injustice in the overall perspective of this case.

The danger of giving an unjustly indiscriminate remedy is present in all exercises of supervisory jurisdiction. By definition, such exercises of judicial power are not focused upon the correction of specifically demonstrated prejudice to identified parties but upon the general regulation of conduct. That danger was present with a vengeance here and has been realized. A brief recapitulation of critical elements in the procedural development of the case illustrates this.

At the trial of these cases, the three plaintiffs had live, powerful claims for both compensatory and punitive damages aris-

ing from an almost incredible act of negligence that -- in what must surely be a relatively rare occurrence -- this major commercial airline had conceded ordinary negligence entitling the plaintiffs to compensatory damages, leaving for trial on their claims only the amount of compensatory damages and the existence and amount of any punitive liability. Following three weeks of trial and seventeen hours of deliberation, a jury gave substantial compensatory awards to the plaintiffs, but denied them punitive damages.

The effect of the en banc decision is not only to strip these plaintiffs of their compensatory damage awards, but to send them back stripped as well of any opportunity to establish before the jury that reconsiders their compensatory awards their possible en-

titlement as well to punitive damages. This misfortune cannot be chalked up simply to the normal hazards of litigation and the inscrutability of jury processes. It stems rather from a circumstance that calls for relief if retrial of all the compensatory awards is to be the result of this appeal.

The compensatory awards are stripped because of the misconduct of counsel for these plaintiffs. But the loss of opportunity to attempt new proof of punitive liability results from a bizarre procedural twist in post-verdict proceedings when both Eastern's motion for new trial on the compensatory awards and the plaintiffs' motions for new trial on the punitive damage issue were being considered. That twist is not fairly chargeable either to plaintiffs or to their

counsel and it may well have led to the cruelest injustice experienced so far by any parties to this action -- in this matter, the plaintiffs. It came about in this way.

Despite the trial judge's finding, as trier-of-fact on a related, essentially congruent, non-jury issue, that "[Eastern's] crew were not simply inadvertent but rather were grossly negligent," see Arnold I, 681 F.2d at 190 n.1, 194 n.8, the judge declined to set aside as against the weight of the same evidence the jury's verdict against plaintiffs on their claims for punitive damages based on the alleged gross negligence of that crew.

Though it is, of course, difficult to be certain of the reasons for this apparent anomaly in the judge's rulings, it seems almost

certain that they represent a practical assessment that the high-side compensatory awards on the one hand and the rejection of any punitive damage awards on the other reflected a jury "compromise." This is indicated both by the judge's reference to the possibility, see id. at 204 n.16, and by the next sad twist in the ironic spiral into procedural disaster now underway for these completely faultless plaintiffs. Of course, if the assessment was of compromise verdicts, the proper technical response was to set both aside and order new trials on both compensatory and punitive damages. But in what now appears an effort to solidify the jury "compromise" as essentially a just one, the trial judge next admonished Eastern's attorneys on the record that if

they successfully appealed the compensatory awards they would face on any new trial they won not only the compensatory damage claims but the punitive damage claims as well. See id. at 206 n.22. Although conditionally ordering such a consequence while declining to set aside the verdict did not lie within the judge's power, see id., it is understandable that counsel for plaintiffs may reasonably and responsibly have assumed that he did have the power. Presumably acting on that assumption, counsel failed to take a cross-appeal, and the unfolding of plaintiffs' procedural misfortunes continued. Technically, of course, the absence of a cross-appeal precluded review of the judge's refusal to set aside the verdict denying punitive damages, and the panel so noted in af-

firming the two personal injury awards and remanding the Weston wrongful death claim. See id.

That technical impediment to cross-relief still exists of course. But it would be a singularly unjust withholding of the court's supervisory power not to grant that cross-relief now as an adjunct to the substantial relief given Eastern in the process of eradicating the perceived injustice stemming from counsel's misconduct. The improvidence of the trial judge's ruling, with its inevitable lulling effect on plaintiffs' counsel, should not be charged to those plaintiffs even if the misconduct of their counsel is now to be. Ample precedent exists for giving this relief, notwithstanding the technical barrier, in an exercise of the same super-

visory jurisdiction that is arguably the most defensible basis of the court's decision to benefit Eastern so handsomely for the dereliction of opposing counsel. See, e.g., Tug Raven v. Trexler, 419 F.2d 536, 548 (4th Cir. 1969); National Association of Broadcasters v. FCC, 554 F.2d 1118, 1127 & n.24 (D.C. Cir. 1976).

For this reason, I would at the least, if the compensatory damage awards are to be set aside, exercise this court's residual power to make a more just overall disposition in this tangled web of procedural misfortune. As a part of the remand, I would direct the trial judge to reconsider, on the record already made, the plaintiffs' motion to set aside the jury verdict finding Eastern not liable for punitive damages. The judge's

initial ruling on that motion was so obviously skewed by understandable concern to salvage verdicts possibly reflecting compromise, and his follow-up attempt to nail down the compromise so obviously misled counsel to plaintiffs' detriment, that this result seems to me compelled by the same considerations of justice that the en banc majority has concluded require setting aside the compensatory awards.

A final injustice involved in the remand for a new trial so handsomely and solely to Eastern's benefit should be noted. It further illustrates the improvidence of the specific decision to rehear en banc in these consolidated cases. And it underscores the unevenness that is likely to result from exercises of supervisory jurisdiction in multi-party,

multi-claim cases where the effects of corrective action on all affected parties either are not, or cannot, be taken into account in shaping the remand.

This concerns the ironic plight of Eastern's insurers (Aetna) in the final denouement. In their consolidated appeals Aetna heavily relied, as did Eastern, on the prejudice allegedly caused it by misconduct of opposing counsel. See Arnold I, 681 F.2d at 192-94. Aetna's challenge on this score was rejected by the panel, as was Eastern's, but in the case of Aetna, the rejection was by unanimous decision of the panel. On Aetna's and Eastern's ensuing petitions for rehearing and suggestions for rehearing en banc, Eastern's suggestion for rehearing en banc of course carried by the narrowest of margins.

At the same time, Aetna's petition for rehearing was being denied unanimously by the panel, and its suggestion for rehearing en banc failed when it prompted no request for consideration by any member of the court. Now Eastern, because of counsel misconduct, has secured a new trial limited to the determination of compensatory damages and has been freed of the potential for punitive liability, while Aetna's appeal based primarily on the same ground has ended in apparent failure, with the Supreme Court's recent denial of Aetna's petition for certiorari following our denial of its petition for rehearing. Aetna Casualty and Surety Co. v. United States, cert. denied, 51 U.S.L.W. 3748 (U.S. April 18, 1983) (No. 82-1177).

It is arguable, and indeed I have always believed, see Arnold I, 681 F.2d at 204,

that Aetna's claim of prejudice from counsel misconduct was even less supportable on a careful record review than was Eastern's. But that was on the basis that, as Judge Bryan and I believed, neither was supportable. It is frankly inconceivable to me -- and I am sure to Aetna -- that if Eastern's claim to relief on that score has sufficient merit to justify en banc corrective action, Aetna's had not enough to merit the same.[14]

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14. Though Aetna is not before us on this rehearing en banc, the en banc majority, apparently recognizing the irony of the situation, has oddly resurrected, at the end of its opinion, that party's rejected appellate claim just long enough to declare summarily that, in contrast to Eastern's, it has no merit. Arnold v. Eastern Air Lines, __ F.2d __ (4th Cir. 1983) (en banc) (No. 80-1245, slip op. at 21). The suggestion is made that the revelation of insurance coverage could only have prejudiced Eastern. But that is not the prejudice claimed by Aetna. See Arnold I, 681 F.2d at 192.

The record simply will not support the drawing of that fine a line between the relative positions of these parties on that matter.

On the overall record of these proceedings, Aetna could be excused if it wondered whether somehow its claim for appellate relief simply fell through the cracks of the en banc procedures in this court.[15] And any fair legal analyst would have to conclude that either this court's decision to rehear Eastern's appeal en banc or its failure to rehear

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15. The crack is probably visible in the different views taken by the panel dissent and the en banc majority on the independent significance of the trial judge's consolidation ruling. The panel dissent thought that no prejudice to either Eastern or Aetna could be assigned independently to that ruling. The decision to rehear Eastern's appeal en banc and the contemporaneous decision not to rehear Aetna's presumably reflected that viewpoint. But that viewpoint has now been rejected by the en banc majority -- too late to benefit Aetna.

Aetna's based upon the same ground was improvident. I have, of course, already indicated which of these I think was improvident. But one surely must have been.

Whatever its other consequences, this case reveals the special perils of indiscriminate decisions to rehear en banc and consequent indiscriminate remands in multi-claim, multi-party cases of this procedural complexity. The trial court's discretionary resolution of the admitted dilemmas created by trial developments remains the more defensible one, as the panel long ago concluded.

I am authorized to say that Judge Sprouse joins in this opinion.

ORDER DATED AUGUST 3, 1982 IN CIVIL ACTION NO. 81-00126, UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COULUMBIA CIRCUIT

No. 81-2091

September Term, 1981

Civil Action N. 81-00126

Argued: 4-19-82

Copper & Brass Fabricators Council, Inc.,

Appellant

v.

Department of the Treasury, et al.

BEFORE: Robinson, Chief Judge; Wright, Tamm, Mackinnon, Wilkey, Wald, Mikva, Edwards, Ginsburg and Bork, Circuit Judges

Appellant's suggestion for rehearing en banc has been circulated to the full Court and a majority of the Court not having voted in favor thereof, it is

ORDERED by the Court en banc that the aforesaid suggestion is denied.

Per Curiam

FOR THE COURT:

GEORGE A. FISHER, Clerk

BY: Robert A. Bonner

Robert A. Bonner

Chief Deputy Clerk

United States Court of Appeals
for the District of Columbia Clerk

FILED

AUGUST 3, 1982

GEORGE A. FISHER
CLERK

Chief Judge Robinson and Circuit Judges Wald, Mikva, Edwards and Ginsburg would grant the suggestion for rehearing en banc.

Circuit Judges Wright and Wilkey did not participate in this matter.

ORDER DATED SEPTEMBER 27, 1982 IN CIVIL ACTION NO. 81-00126, UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 81-2091

September Term, 1981
Civil Action No. 81-00126

Copper & Brass Fabricators Council Inc.,

Appellant

v.

Department of the Treasury, et al.

BEFORE: Robinson, Chief Judge, Wright, Tamm, MacKinnon, Wilkey, Wald, Mikva, Edwards, Ginsburg, Bork and Scalia, Circuit Judges

It is ORDERED by the Court en banc, sua sponte, that the Clerk is directed to file the lodged motion of appellant for reconsideration of the denial of the

suggestion for rehearing en banc. The Clerk is further directed to file the lodged response to the motion for reconsideration and appellant's lodged reply. On consideration of the foregoing, it is

ORDERED by the Court en banc that appellant's motion for reconsideration is denied.

Per Curiam

Filed
7/27/82
Geo. A. Fisher,
Clerk

For The Court

George A. Fisher, Clerk

By: Robert A. Bonner

Robert A. Bonner

Chief Deputy Clerk

Circuit Judges Wright and Wilkey did not participate in this order.